[redacted]

SUPREME COURT OF THE [redacted]

OCTOBER TERM, [redacted]

No. [redacted]

H. P. LLOYD, ASSIGNEE OF E. L. HARPER, [redacted]
IN ERROR,

vs.

HATTIE A. MATTHEWS AND J. H. [redacted]

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF [redacted]

[redacted]

(14,457.)

# (14,467.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1893.

## No. 377.

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H. P. LLOYD, ASSIGNEE OF E. L. HARPER, PLAINTIFF IN ERROR,

*vs.*

HATTIE A. MATTHEWS AND J. H. OTTEN.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Transcript from chancery court | 2 | 1 |
| Caption | 2 | 1 |
| Order filing petition of Hattie A. Matthews and J. H. Otten, making them parties defendants, and that their petition be taken as answer and cross-petition | 2 | 1 |
| Petition of Hattie A. Matthews and J. H. Otten | 2 | 2 |
| Order filing pleadings | 5 | 3 |
| Note as to exhibit to petition of Hattie A. Matthews | 5 | 3 |
| Joint amended answer and cross-petition of Hattie A. Matthews and J. H. Otten | 5 | 3 |
| Exhibit C—Note of Harper to Matthews, August 8, 1881 | 7 | 5 |
| Reply and answer of Lloyd, trustee | 8 | 5 |
| Order as to motion to strike out and submission | 14 | 8 |
| Order filing motion to strike out depositions, &c. | 14 | 8 |
| Motion to strike depositions from the files | 14 | 9 |
| Amended answer, set-off, and cross-petition of Lloyd, trustee | 16 | 9 |
| Order filing exceptions to depositions | 18 | 11 |
| Exceptions to depositions | 19 | 11 |


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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1893.

| | Original. | Print. |
|---|---|---|
| Order submitting exceptions, &c. | 23 | 13 |
| Order overruling exceptions, &c. | 23 | 13 |
| Order filing reply of Hattie A. Matthews | 23 | 14 |
| Reply of Hattie A. Matthews | 23 | 14 |
| Order submitting motion to set aside order overruling exceptions, &c. | 24 | 14 |
| Order and opinion on exceptions to depositions | 24 | 14 |
| Order submitting offer of Lloyd to file amended answer, &c. | 25 | 15 |
| Amended answer of Lloyd | 26 | 15 |
| Judgment | 27 | 16 |
| Appeal of Matthews and Otten | 28 | 17 |
| Deposition of Hattie A. Matthews | 28 | 17 |
| Agreement as to assignment, &c. | 36 | 22 |
| Deposition of Mrs. Emma Harper | 37 | 22 |
| Agreement as to facts | 42 | 24 |
| Deposition of James H. Mathews | 43 | 25 |
| J. H. Otten | 48 | 28 |
| Albert P. Gahr | 52 | 30 |
| Schedule of record for court of appeals | 56 | 32 |
| Notice of schedule | 57 | 33 |
| Clerk's certificate | 58 | 33 |
| Statement of appellants | 58 | 34 |
| Order of continuance for oral argument | 58 | 34 |
| Order: cause heard | 59 | 34 |
| Judgment | 59 | 34 |
| Order extending time to file petition for rehearing | 59 | 34 |
| Order submitting motion in opposition to extending time to file petition for rehearing | 59 | 35 |
| Motion and grounds to modify order extending time to file petition for rehearing | 59 | 35 |
| Response to motion to reduce the time to file petition for rehearing | 61 | 36 |
| Order modifying order extending time to file petition for rehearing | 62 | 37 |
| Order filing petition for rehearing | 62 | 37 |
| Petition for rehearing | 63 | 37 |
| Order submitting motion for rehearing | 94 | 53 |
| Order overruling petition for rehearing | 94 | 54 |
| Opinion | 94 | 54 |
| Writ of error | 101 | 57 |
| Clerk's certificate | 104 | 58 |
| Bond | 105 | 58 |
| Citation | 107 | 60 |

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the honorable the court of appeals of Kentucky, held at the capitol, in the capital, the city of Frankfort, on the 27th day of February, A. D 1890, Chief Justice Joseph H. Lewis and Judges William H. Holt, Caswell Bennett, and William S. Pryor, presiding.

HATTIE A. MATTHEWS & J. H. OTTEN, Appellants,
*vs.*
H. P. LLOYD, Assignee of E. L. Harper, and FIDELITY BUILDING ASSOCIATION, Appellees.

Be it remembered that heretofore, to wit, on the 12th day of December, A. D. 1888, the appellants, by their attorney, filed in the office of the clerk of the Kentucky court of appeals their transcript in words and figures following, to wit:

2 STATE OF KENTUCKY:

*Pleas.*

Campbell Chancery Court.

Pleas before the Hon. J. W. Menzies, chancellor of the chancery court, at the court-house, in the city of Newport, Ky., on the 7th day of September, 1888.

*Style of Suit.*

ALBERT SILVA
*vs.*
FIDELITY NATIONAL BANK, &c.
# 3272. Consolidated Cases. In Equity.

Be it remembered that heretofore, to wit, on the 16th day of September, at the September term (1888) of the Campbell chancery court, the following order was made, to wit:

*Preamble and Order: Hattie A. Mathews & J. H. Otten Filed Pet'n to be Made Party, & they are Made Party & Pet'n Taken as Their Answer & X Petition.*

Came Hattie A. Matthews and J. H. Otten and filed their petition to be made party, and they are made party defendants and their petition is taken as their answer and cross-petition herein.

The petition to be made party referred to in the foregoing order is in words and figures as follows, to wit:

*Petition to be Made Party.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ff, vs. FIDELITY NATIONAL BANK, &c., Def'ts. } Petition of Hattie A. Matthews & J. H. Otten to be Made Parties.

The petitioners, Hattie A. Matthews and J. H. Otten, present this their petition to be parties defendant of the record herein
3 for the following reasons, to wit: Petitioners say that the defendant E. L. Harper a short while before he executed the deed of assignment in the pleadings referred to was the owner of 20 shares of stock in the Fidelity Building, Saving & Loan Company of Newport, Kentucky, of the full value of — dollars, which was evidenced by book of the said company No. 32, which is made an exhibit of this pleading. Petitioners say further that the said E. L. Harper was a creditor of the petitioner Hattie A. Matthews in a sum equal to the full face value of the said building association stock.

Petitioners say that at the time of the said deed of assignment and theretofore and since the said defendant, E. L. Harper, was a citizen and resident of the State of Ohio, and by the laws in existence at that time in said State of Ohio debtors had the right to make preference in the payment of their creditors either in the deed of assignment or by paying them theretofore in such a way as they saw proper.

Petitioners say that on the day *of* the said deed of assignment was made and executed in the State of Ohio, to wit, on the 21*th* day of June, 1887, several hours before the execution of said deed of assignment, the said E. L. Harper, defendant, executed and delivered in writing to the petitioner J. H. Otten all the said 20 shares of stock of said building association, with directions to him, the said J. H. Otten, to collect the proceeds of the said stock and pay the same to the petitioner Hattie A. Matthews.

4 Petitioners say that by the said transfer of assignment, which is recorded in the said book that is made an exhibit to this pleading, the petitioner Hattie A. Matthews became and is now the owner of the said stock *of* the proceeds thereon. Petitioners say further that plaintiffs in the consolidated cases herein, H. M. Healy, A. R. Bloomfield, Peter Schultz, and Albert Silva, in their said suits attached the said building association stock as the property of said defendant, E. L. Harper, and are severally asserting claim thereto in this case.

Petitioners say further, H. P. Lloyd, assignee in the State of Ohio of the said E. L. Harper, has also been made a party to the defendant herein, and claims the said stock as part of the assignment of the estate of the said E. L. Harper.

Petitioners say said transfer was *bona fide* and for a valuable consideration, and passed all interest of the said E. L. Harper thereto.

Petitioners now come and ask to be made parties defendant to

this suit, that this pleading be taken as their answer and cross-petition, and pray further as against the said several plaintiffs who have attached the said stock, and also pray as against the said H. P. Lloyd that the said stock in the said building association be adjudged the property of defendant Hattie A. Matthews, for costs and for all proper relief.

R. W. NELSON & JNO. S. DUCKER,
*Attorneys for Hattie A. Matthews and J. H. Otten.*

5 CAMPBELL COUNTY, }
*State of Kentucky.* }

Petitioner Hattie A. Matthews says the statements of the foregoing pleadings are true as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD,
*Ex. C. C. C.*

Thereafter, at the January term of the court, on the 14th day of January, 1888, the following order was made, to wit:

*Order: Hattie A. Mathews Filed Exhibit to Her Pet'n & Mathews & Otten Filed Joint Am'd Ans. & X Pet'n, & Lloyd, Tr., Filed Reply & Ans.*

Came Hattie A. Matthews and filed exhibit to her petition to be made party, and Hattie A. Matthews and J. H. Otten filed joint amended answer and cross-petition, and Lloyd, trustee, filed reply and answer.

*Exhibit to Pet'n of Mathews.*

The exhibit to petition of Hattie A. Matthews does not appear among the papers in this case.

The joint amended answer and cross-petition referred to in foregoing order is in words and figures as follows, to wit:

*Joint Am'd Ans. & X Pet'n of Mathews & Otten.*

Campbell Chancery Court.

ALBERT SILVA, Pl't'ff, }
*vs.*
FIDELITY NATIONAL BANK. }

And Consolidated cases.

Hattie A. Matthews and J. H. Otten, who have heretofore been made parties defendant to these consolidated cases, and their petition filed to be made parties having been taken as their answer and

cross-petition, now come and amend their said pleading and
6 say that their codefendant, E. L. Harper, on the 8th day of August, 1881, agreed and promised to pay on demand to the defendant Hattie A. Matthews the sum of $5,000.00, with 8 % interest from date until paid, and the interest was to be paid quarterly.

Plaintiff says the said contract was executed in Cincinnati, Ohio, where this defendant and the said E. L. Harper then resided, and by the laws of the said State of Ohio then in existence contracts for 8 % interest for the use of money were legal, valid, binding, and obligatory.

Plaintiff says on the said note the interest was paid to January 1st, 1882, and on the — day of June, 1887, when the stock of said Fidelity Building, Saving and Loan Company was transferred to the defendant Hattie A. Matthews through the defendant J. H. Otten, there was due something over $7,000.00 on said debt. The defendants file herewith as part of said pleading the said original note hereinbefore described and mark it Exhibit "C."

Plaintiff says that at the time of the transfer of the said building association stock, in June, 1887, to the defendant Hattie A. Matthews, the assignment of which is also made part of this pleading, the said building association stock was worth $4,188.88 or thereabouts, and the said Harper owes the defendant Hattie A. Matthews at least $3,000.00 yet on the said indebtedness after crediting said building association stock.

Wherefore the defendants makes this and their former pleading cross-petitions against all the plaintiffs herein and against de-
7 fendant Lloyd, against defendant building association, and all other defendants, and pray as in their original pleading, the same filed on September 16th, 1887, for costs and for general relief.

JNO. S. DUCKER,
*Att'y, Campbell County, State of Kentucky.*

The defendant Hattie A. Matthews says the statements of the petition to be made party that was filed herein on the 16th day of September, 1887, by her and her codefendant, J. H. Otten, were true, and the statements of the above pleading are true, as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD, *Ex. C. C.*

Exhibit "C" referred to in foregoing amended answer, &c., is in words and figures as follows, to wit:

EXHIBIT "C" TO AM'D ANS. OF MATHEWS.

$5,000.00. CINCINNATI, *Aug. 8th*, 1881.

On demand, after date, I promise to pay to the order of Miss Hattie A. Matthews five thousand dollars, value received, with 8 % interest from date till paid; interest payable quarterly.

E. L. HARPER.

Endorsed: Interest paid on the within note Jan. 1st, 1882.

(Endorsed in pencil.)

| | |
|---|---|
| "July 14, 1887, note & int. | 7,188 88 |
| 20 shares build., Newport | 4,188 88 |
| Bal. due | 3,000 00" |

8 The reply and answer of Lloyd, trustee, referred to in foregoing order is in words and figures as follows, to wit:

*Reply & Ans. of Lloyd, Tr.*

Campbell Chancery Court.

ALBERT SILVA, Plaintiff, *vs.* FIDELITY NATIONAL BANK, &c., Defendants. } Reply to Answer and Answer to Cross-petition of Otten & Matthews in Consolidated Cases.

The defendant Harlan P. Lloyd, trustee of E. L. Harper, for reply to the answer and answer to the cross-petition of John Otten and Hattie A. Matthews in the consolidated cases herein says that he admits that a short time before said E. L. Harper executed his deed of assignment to this defendant he, said Harper, was the owner of twenty shares of stock mentioned in the Fidelity Building, Savings and Loan Company of Newport, Kentucky, but he denies that said E. L. Harper was a creditor or debtor of the said Matthews in a sum equal to the face value of the said stock or in any other sum whatever at the time of the said assignment. He admits that at the time of the execution of his said deed of assignment said Harper was a citizen and resident of the State of Ohio; so was said Matthews. He denies that at the time of making said assignment that debtors had by the laws of the State of Ohio the right to prefer their creditors in the deed of assignment. Defendant admits that within a few hours before the execution of the deed of assignment the said

9 Harper attempted by an endorsement or pretended assignment in the pass book of said Harper evidencing his interest in said association to transfer to said J. H. Otten the said shares in said association, but denies that he gave directions or any direction to said Otten to collect the proceeds of the said shares or to pay over when collected the proceeds of said shares to said Matthews. He denies that there was any consideration whatever to or

for the said pretended assignment by said Harper to said Otten or that by said transfer or assignment the said Matthews became or was or is now the owner of the said shares of stock or the proceeds thereof.

Defendant denies that said transfer of said shares of stock was *bona fide* or for a valuable consideration or that it passed any interest of said Harper thereto.

2nd. For further defense defendant says that at the time of the assignment of said Harper on the 21st day of June, 1887, the said Harper and Matthews were both residents and citizens of Hamilton county, State of Ohio; that said Harper was hopelessly insolvent and was then contemplating the making of the assignment which he subsequently made as referred to by this defendant in his answer and cross-petition in the consolidated cases herein, which facts *are* well known to both said Matthews and said Otten at the time of the pretended transfer of said shares of stock to said Otten; and this defendant says that the said transfer and conveyance of said shares of stock to said Otten by said Harper was made for the purpose and with the intent to defraud the creditors of said Harper of their just and lawful debts; and de-
10 fendant says that under and by virtue of the laws of the State of Ohio, Revised Statutes, volume 1, sec. 4196, which said law was then and is now in full force and effect and provides as follows, to wit: "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels, and every bond, judgment, or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods, or chattels shall be deemed utterly void and of no effect"—

The said alleged transfer and assignment by said Harper of said shares of stock was fraudulent and void and of no effect, and that the title to and ownership of the said shares of stock passed under the deed of assignment of said Harper to this defendant, who is now the legal owner and holder of the same and entitled to have and receive the proceeds of the same, to be administered by him as the law in such cases in the State of Ohio made and provided directs. The said Harper at the time of said alleged transfer was largely in debt, and numerous claims then existed and now exist against his said estate on which only a small percentage can be paid from the assets and estate of the said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

3rd. For further defence defendant says that at the time said Harper made said alleged transfer of said share of stock in said association to said Otten he, said Harper, was hopelessly insolv-
11 ent, and within a few hours thereafter said Harper made the assignment for the benefit of his creditors under which this defendant claims, as set out in his answer and cross-petition herein, to which reference is here made, and said alleged transfer and conveyance to said Otten or said Matthews, as claimed by her, was made without any valuable consideration whatever therefor, and

was illegal and void and of no effect as against the then existing creditors of said Harper and against this defendant, the representative of said creditors. Said Harper at said time was largely in debt, and numerous claims then existed and now exist against his said estate, on which only a small percentage can be paid from the asset/s and estate of said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

4th. For further defense this defendant says that at the time of the alleged transfer of said stock in said association to said Otten said Harper was hopelessly insolvent, and within a few hours thereafter made the deed of general assignment for the benefit of his creditors, and under which this defendant claims the said shares of stock, as set out in his answer and cross-petition herein, to which reference is here made. The said transfer of assignment to said Otten or Matthews, as it may be, was made by said Harper with the intent to delay, hinder, and defraud his then existing creditors, the said Otten and Matthews being well aware of the insolvency of said Harper and of the purpose and intent of said Harper in making said alleged transfer when it was made; and defendant says
12 that said transfer and assignment was illegal and void as to the then creditors of said Harper and this defendant, their representative, and passed no title to said shares of stock to said Otten or Mathews, but the same passed to and now belongs to this defendant under the said deed of assignment of said Harper to this defendant, who is now the owner thereof and entitled to have the said stock and its proceeds as trustee under said deed to be administered under said trust.

5th. For further defense defendant says that at the time of the alleged transfer and assignment of said shares of stock in said association by said Harper to said Otten or said Mathews, if the same was made for her benefit, as alleged by her in her answer herein, the said Harper was hopelessly insolvent and in contemplation of insolvency and of the making of the deed of general assignment of all his property for the benefit of all his creditors, as subsequently made by him within a few hours of the time of said alleged transfer to said Otten, and if the transfer were made for the benefit of said Mathews, as claimed and alleged by her, it was made by said Harper with the intent to prefer her over his other creditors (if she was a creditor, which defendant denies), and was void under and by virtue of the laws of the State of Ohio, of which State said Harper and said Mathews were then citizens and where they then resided and wh*er*e said deeds of assignment by said Harper was made, — sec. 6343, volume 2, page 1332, Revised Statutes of the Laws of the State of Ohio, which laws were then and are now in full force and
13 effect and which read as follows, to wit: "All assignments in trust to a trustee or trustees, made in contemplation of insolvency with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter," the said transfer or assignment inured to the equal benefit of all the

creditors of said Harper, to be administered by this defendant under the law in such cases made and provided and under his trust as trustee of said Harper, and this defendant is entitled to have said shares of stock and their proceeds, to administer the same under his said trust.

Wherefore, having fully answered the cross-petition and replied to the answer of the defendants, Otten and Matthews, he prays as in his original answer and cross-petition and for all proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

STATE OF OHIO, }
*Hamilton County.* }

Harlan P. Lloyd, trustee of E. L. Harper, being duly sworn, says that he believes that the statements of the foregoing reply and answer are true.

HARLAN P. LLOYD,
*Trustee of Estate of E. L. Harper.*

Subscribed in my presence and sworn to before me this 4th
14 day of January, 1888.

WM. S. WALKER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

And at the January term of the court, on the 13th day of January, 1888, the following order was made, to wit:

*Order: Otten & Mathews Move to Strike Ans. of Lloyd, Tr., from File and Lloyd, Trustee, Objects, & Sub'td on said Motion.*

Lloyd, trustee, moves to set aside the order of January 11th, 1888, which sets aside the filing of his answer, and Brownell objects. The *the* court overruled the objections and the order setting aside the filing of Lloyd's answer is set aside, and, on motion of Lloyd, trustee, this cause is submitted upon his cross-petition and the whole case, and Brownell excepts, and Otten and Mathews move to strike the answer of Lloyd, trustee, from the files, and Lloyd, trustee, objects, and this cause is submitted on said motion.

And thereafter, at the May term of the court, on the 7th day of May, 1888, the following order was made, to wit:

*Order: Lloyd, Tr., Filed Mo. to Strike the Dep'n of Mrs. Harper fr. Files & Pl'ff Objects, & Lloyd, Trustee, Off'd Am'd Ans'r & Set-off & X Pet'n Aq'st Hattie A. Mathews, &c., & They Object.*

Lloyd, trustee, filed motion to strike the depositions of Mrs. Harper and Hattie A. Matthews from the files, and plaintiff objects, and Lloyd, trustee, offered an amended answer and set-off and cross-petition against Hattie A. Matthews and John Otten; to the filing of which said Matthews and Otten object.

The motion to strike depositions from the files referred to in foregoing order is in words and figures as follows, to wit:

*Motion to Strike Dep'ns of Mathews & Otten from Files.*

Campbell Chancery Court.

ALBERT SILVA, &c., Pl'ffs, *vs.* FIDELITY NATIONAL BANK, &c., Def'ts. } Motion of Lloyd, Trustee, to Strike Depositions of Mrs. Harper & Miss Matthews from the Files.

15

The defendant and cross-petitioner, Harlan P. Lloyd, trustee of E. L. Harper, now comes and moves the court to strike the deposition- of Emma F. Harper and Hattie A. Matthews from the files of this court and to suppress them because—

1st. Mrs. Harper is the wife of the defendant E. L. Harper, of whose estate H. P. Lloyd is trustee, and said Emma F. Harper testified in her said deposition in favor of said Mathews and against said E. L. Harper and his trustee, Lloyd, and is incompetent as a witness in said matter and controversy between said Harper and his trustee, Lloyd, and said Matthews.

2nd. Said E. L. Harper, of whom said Lloyd is trustee,— at the time said depositions were taken and is now confined in the penitentiary in Columbus, State of Ohio, as a prisoner and convict, under a sentence of ten years, for embezzlement and fraudulent conversion to his own use of the funds and assetts of the Fidelity National bank, and said testimony of said Matthews is in favor of herself and against said Harper and his trustee, Lloyd, and said Matthews is an incompetent witness in her own behalf.

C. L. RAISON, JR.,
*Att'y for Lloyd, Trustee.*

The amended answer, set-off, and cross-petition referred to in the foregoing order is in words and figures as follows, to wit:

16 *Am'd Ans'r, Set-off, & X Pet'n. Off'r'd May 7, '88.*

Campbell Chancery Court.

ALBERT SILVA, &c., Plaintiffs, *vs.* FIDELITY NATIONAL BANK, &c., Defendants. } Amended Answer, Set-off, and Cross-petition of Harlan P. Lloyd, Trustee of Estate of E. L. Harper. ag'st John Otten & Hattie A. Matthews.

Harlan P. Lloyd, trustee of the individual estate of E. L. Harper, now comes and amends his answer to the cross-petition of Hattie A. Matthews and John Otten herein, and says that he denies that on the day the alleged transfer of the twenty shares of stock in the Fidelity Building and Saving & Loan Company was pretended to have been made by said E. L. Harper to the defendant Otten, to wit, June 21st,

1887, there was due to said Hattie A. Matthews from said E. L. Harper on the note for $5,000.00, set out in the petition and filed therewith, over the sum of $7,000.00, or that there was anything whatever due on said note. There was nothing due from said Harper to said Matthews at said time on account of said note or otherwise.

He denies that at the time of the alleged transfer — said shares of said building association stock to said Otten it was only worth $4,188 88, or thereabouts. It was worth at said time over $4,900.00. He denies that there is yet $3,000.00 or any other sum due on said note or otherwise from said Harper to said Matthews. This defendant further says that since the filing of his last pleading herein,
17 to wit, January 4th, 1888, he has discovered that E. L. Harper on the 5th day of January, 1883, sold and transferred to said Hattie A. Matthews 50 shares, of the par value of $100 each share, making the sum of $5,000.00, of the capital stock of the Swift's iron and steel works, which was either delivered to and received by said Matthews in full satisfaction of the claim against said E. L. Harper, if any she had, or the transfer was without any consideration whatever, and this defendant and cross-petitioner cannot state which part is true, but he says that one or the other is true.

He says that said stock at said time was reasonably worth the sum of $100 a share, the par value of said stock, and that if said stock was not transferred by said Harper and received by said Matthews in satisfaction of her claim against said Harper to the extent of the same, then she is in debt to and there is due and owing to this defendant and cross-petitioner, as trustee of said Harper, from the said Matthews the sum of $5,000.00, with interest from the 5th day of January, 1883, which sum in such case is just, due, and unpaid either in whole or in part.

He prays the court that an account may be taken to ascertain what sum, if any, was due from said Harper on the said 5th day of January, 1883, and that if upon such accounting anything be found to have been due from said Harper to said Matthews that the value of said stock, to wit, $5,000.00, may be set off against said claim, as of date Jan'y 5th, 1883, and that he may have judgment
18 against her for the unpaid balance on said stock, or that if it should appear upon such accounting that there was nothing due to said Matthews on said date that then he may have judgment against said Mathews for the sum of $5,000.00, with interest from the 5th day of January, 1883, and costs, and he makes the pleading an amended answer, set-off, and cross-petition against said Matthews and Otten and prays for all general and proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell County.* }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney of Harlan P. Lloyd, trustee of E. L. Harper; that said

Lloyd, trustee, is now absent from this county and State, and this affiant says that he believes that the statements of the foregoing amended answer, set-off, and cross-petition are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

JOHN C. SCHROLL, *Cl'k*,
By A. L. RENSCHER, *D. C.*

And at the same term of the court, on the 9th day of May, 1888, the following order was made, to wit:

*Order: Lloyd, Tr., Filed Excep'ns to Dep'ns of Mrs. Harper, &c.*

Lloyd, trustee, filed exceptions to the depositions of Mrs.
19 Harper, Hattie A. Matthews, John H. Matthews, John N. Otten, and A. P. Gahr.

The exceptions to depositions referred to in foregoing order *is* in words and figures as follows, to wit:

*Excep'ns to Dep'ns.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ffs,
*vs.*
FIDELITY NATIONAL BANK, &c., Def'ts.

Exceptions of Lloyd, trustee, to depositions of Emma F. Harper, John H. Matthews, John H. Otten, A. P. Gahr, and Hattie A. Matthews.

1. Lloyd, trustee, excepts to the whole deposition of Emma F. Harper and Hattie A. Matthews and asks that the same may each be suppressed and held to be incompetent, said witnesses being incompetent to testify in this cause in favor of said Hattie A. Matthews and against E. L. Harper and H. P. Lloyd, trustee of his estate, because—

1. The witness Emma F. Harper is the wife of the defendant E. L. Harper, of whose estate said Lloyd is trustee, and is incompetent as a witness in this cause in favor of said Hattie A. Matthews in the matter of the controversy between said Hattie A. Matthews and said E. L. Harper and Lloyd, his trustee, &c., in these consolidated cases.

2nd. To the depositions of Hattie A. Matthews. Said Matthews is incompetent as a witness in this case in her own favor in the controversy between herself and E. L. Harper, and Lloyd, his trustee,
as to the ownership of the 20 shares of stock in the Fidelity
20 Loan, Building & Saving Association, because E. L. Harper, of whom she claims to have received said stock by transfer through Otten in trust for her, is a prisoner confined in the

1887, there was due to said Hattie A. Matthews from said E. L. Harper on the note for $5,000.00, set out in the petition and filed therewith, over the sum of $7,000.00, or that there was anything whatever due on said note. There was nothing due from said Harper to said Matthews at said time on account of said note or otherwise.

He denies that at the time of the alleged transfer — said shares of said building association stock to said Otten it was only worth $4,188 88, or thereabouts. It was worth at said time over $4,900.00. He denies that there is yet $3,000.00 or any other sum due on said note or otherwise from said Harper to said Matthews. This defendant further says that since the filing of his last pleading herein,
17 to wit, January 4th, 1888, he has discovered that E. L. Harper on the 5th day of January, 1883, sold and transferred to said Hattie A. Matthews 50 shares, of the par value of $100 each share, making the sum of $5,000.00, of the capital stock of the Swift's iron and steel works, which was either delivered to and received by said Matthews in full satisfaction of the claim against said E. L. Harper, if any she had, or the transfer was without any consideration whatever, and this defendant and cross-petitioner cannot state which part is true, but he says that one or the other is true.

He says that said stock at said time was reasonably worth the sum of $100 a share, the par value of said stock, and that if said stock was not transferred by said Harper and received by said Matthews in satisfaction of her claim against said Harper to the extent of the same, then she is in debt to and there is due and owing to this defendant and cross-petitioner, as trustee of said Harper, from the said Matthews the sum of $5,000.00, with interest from the 5th day of January, 1883, which sum in such case is just, due, and unpaid either in whole or in part.

He prays the court that an account may be taken to ascertain what sum, if any, was due from said Harper on the said 5th day of January, 1883, and that if upon such accounting anything be found to have been due from said Harper to said Matthews that the value of said stock, to wit, $5,000.00, may be set off against said claim, as of date Jan'y 5th, 1883, and that he may have judgment
18 against her for the unpaid balance on said stock, or that if it should appear upon such accounting that there was nothing due to said Matthews on said date that then he may have judgment against said Mathews for the sum of $5,000.00, with interest from the 5th day of January, 1883, and costs, and he makes the pleading an amended answer, set-off, and cross-petition against said Matthews and Otten and prays for all general and proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell County.* }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney of Harlan P. Lloyd, trustee of E. L. Harper; that said

Lloyd, trustee, is now absent from this county and State, and this affiant says that he believes that the statements of the foregoing amended answer, set-off, and cross-petition are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

JOHN C. SCHROLL, *Cl'k*,
By A. L. RENSCHER, *D. C.*

And at the same term of the court, on the 9th day of May, 1888, the following order was made, to wit:

*Order: Lloyd, Tr., Filed Excep'ns to Dep'ns of Mrs. Harper, &c.*

Lloyd, trustee, filed exceptions to the depositions of Mrs.
19 Harper, Hattie A. Matthews, John H. Matthews, John N. Otten, and A. P. Gahr.

The exceptions to depositions referred to in foregoing order *is* in words and figures as follows, to wit:

*Excep'ns to Dep'ns.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ff*s*,
*vs.*
FIDELITY NATIONAL BANK, &c., Def'ts.

Exceptions of Lloyd, trustee, to depositions of Emma F. Harper, John H. Matthews, John H. Otten, A. P. Gahr, and Hattie A. Matthews.

1. Lloyd, trustee, excepts to the whole deposition of Emma F. Harper and Hattie A. Matthews and asks that the same may each be suppressed and held to be incompetent, said witnesses being incompetent to testify in this cause in favor of said Hattie A. Matthews and against E. L. Harper and H. P. Lloyd, trustee of his estate, because—

1. The witness Emma F. Harper is the wife of the defendant E. L. Harper, of whose estate said Lloyd is trustee, and is incompetent as a witness in this cause in favor of said Hattie A. Matthews in the matter of the controversy between said Hattie A. Matthews and said E. L. Harper and Lloyd, his trustee, &c., in these consolidated cases.

2nd. To the depositions of Hattie A. Matthews. Said Matthews is incompetent as a witness in this case in her own favor in the controversy between herself and E. L. Harper, and Lloyd, his trustee, as to the ownership of the 20 shares of stock in the Fidelity
20 Loan, Building & Saving Association, because E. L. Harper, of whom she claims to have received said stock by transfer through Otten in trust for her, is a prisoner confined in the

State penitentiary of the State of Ohio at Columbus under a ten-year sentence for embezzling and converting to his own use the funds and property of the Fidelity National bank. Said Harper made an assignment for benefit of creditors and said Lloyd is the trustee under said assignment.

3. Exceptions to Hattie A. Matthews' deposition. He excepts to question and answer No. 2 because said Matthews is incompetent to the facts and especially as to the amount owed her by E. L. Harper August 8th, 1881.

4th. He excepts to question and answer 6 of the direct examination of the witness because same is incompetent and irrelevant and purports to give statements of E. L. Harper about which he is disqualified from and incompetent as a witness to testify.

5th. To question and answer 8 in direct examination of the witness because incompetent and irrelevant.

6. He excepts to question and answer 9 in re-examination of the witness because incompetent and irrelevant.

7th. He excepts to question and answer 10 in same examination for same reason.

8. He excepts to question 11 in same examination because it is leading and also incompetent for reasons that Harper cannot testify.

Lloyd, trustee, excepts to the following questions and answers of the deposition of Emma F. Harper:

1st. He excepts to so much of the answer to question 4 in
21 the direct examination of the witness as attempts to state that Miss Matthews gave money to E. L. Harper, what Harper did with it, and what Harper told her about the matter, because the same is incompetent and irrelevant.

2nd. He excepts to question 5 and answer thereto because incompetent and irrelevant.

3. To question 6 and answer thereto for same reason.

4. He excepts to question 7 and answer thereto because incompetent and irrelevant and not competent against Harper or Lloyd, trustee.

5. To question 9 thereto and answer for same reasons.

He also excepts to the following questions and answers in the deposition of James H. Matthews:

1. He excepts to so much of the answer to question 3 as states that the money of Miss Matthews was given to Harper, and that he invested it, because incompetent as against Lloyd, trustee, and E. L. Harper.

2. He excepts to the whole of the answer to question 4 because incompetent and irrelevant as against Lloyd, trustee, and Harper.

3. He excepts to question 5 and answer thereto for same reasons as above.

4. He excepts to questions 7, 8, 9, and answers thereto for same reasons.

5. He excepts to question 10 and the entire answer thereto because the same purports to give acts, statements, directions, and statements of E. L. Harper, who is disqualified by statute as a wit-

ness, and the testimony is incompetent as against Harper or Lloyd, trustee.

22 6. He excepts to so much of question 12 of the witness as states that Scarlett was instrumental in getting Harper to take stock, &c., in the building association for same reasons as above.

He also excepts to the following questions and answers of John H. Otten:

1. He excepts to question 9 and answer thereto because incompetent and irrelevant.

2. He excepts to questions 10, 11, 12, and the answers thereto because incompetent and irrelevant.

3. He excepts to all of the answer to question 10 except the following: "When I asked him for this money the demand was written," because incompetent and irrelevant.

4. He excepts to question and answer thereto in redirect examination of the witness because incompetent and irrelevant.

He also excepts to the following questions and answers in the deposition of Albert P. Gahr:

1. He excepts to so much of the answer to question 2 in the direct examination as undertakes to state any of the acts, statements, and admissions of E. L. Harper because the same are incompetent as against Harper and Lloyd, trustee.

2. He excepts to the question 3 and answer thereto because incompetent and irrelevant as against said E. L. Harper and Lloyd, trustee.

3. He excepts to question and answer 6 because incompetent and irrelevant.

Wherefore Lloyd, trustee, asks that his said exceptions may be sustained.

23 C. L. RAISIN, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

And at the same term of the court, on the 11th day of May, 1888, the following order was made, to wit:

*Order: Sub't'd on Lloyd's Excep'ns to Dep'ns & on Offer to File Am'd Ans. & X Pet'n.*

This cause is submitted on Lloyd's exceptions to depositions and on the offer to file amended answer and cross-petition of Lloyd, trustee.

And at the same term of the court, on the 14th day of May, 1888, the following order was made, to wit:

*Order: Excep'ns of Lloyd, Tr., to Dep'ns Over'ed & Lloyd, Tr., Excepts, & Am'd Ans. & Set-off & X Pet'n Off'd by Lloyd, Tr., — Excepts, & on His Mo. Made Part of Record.*

The exceptions of Lloyd, trustee, filed May 7th and 9th, 1888, to the depositions herein are overruled and Lloyd, trustee, excepts,

and the amended answer and set-off and cross-petition offered May 7th, 1888, by Lloyd, trustee, the verification of the same being waived, is refused, and Lloyd, trustee, excepts, and on his motion the same is made part of the record.

And at the same term of the court, on the 18th day of May, 1888, the following order was made, to wit:

*Order: Hattie Mathews Filed Reply to Ans. & X Pet. of Lloyd, Trustee.*

Came Hattie A. Matthews and filed reply to the answer and cross-petition of Lloyd, trustee.

The reply of Hattie A. Matthews to answer and cross-petition of Lloyd referred to in the foregoing order is in words and figures as follows, to wit:

*Reply of Hattie Mathews to Ans. & X Pet., — Lloyd.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ff,
*vs.*
FIDELITY NATIONAL BANK, Def'ts.
} Reply of Hattie A. Matthews to Answer and X Petition of H. P. Lloyd.

& consolidated cases.

24 The defendant Hattie A. Matthews for reply to answer and cross-petition of H. P. Lloyd says she admits E. L. Harper was insolvent when he assigned the building association stock to her.

She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but, as was stated in her original pleadings, this was allowable under the laws of Ohio.

She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, that there is anything which invalidates the transfer of the stock to this defendant, the same involved in the case.

Wherefore the defendant prays as in her original pleadings and for general relief.

JNO. S. DUCKER,
*Att'y for Hattie A. Matthews.*

And thereafter, at the September term of the court, on the 3rd day of September, 1888, the following order was made, to wit:

*Order: Lloyd, Tr., Moved to Set Aside Judg't Over'l'g Excep'ns to Dep'ns & Subm't'd on said Mo.*

Lloyd, trustee, moved the court to set aside the judgment overruling the exceptions of May 7th and 9th, 1888, to depositions and this cause is submitted on said motion.

And at the same term of the court, on the 5th day of September, 1888, judgment on exceptions to depositions was rendered as follows, to wit:

*Judg't on Excep'ns of Lloyd, Tr., to Dep'ns.*

Mrs. Harper cannot testify against her husband. If her testimony is introduced to establish the claim of Hattie A. Matthews against the estate of Harper it is incompetent. The claim must be established by other evidence. If her evidence or testimony is used to show that Matthews is entitled to satisfaction and of a particular fund it is not perceived that such testimony is against the husband of the witness, because if Matthews is not thus satisfied her husband will remain bound to Matthews.

If Matthews' deposition was taken after Harper was sent to the penitentiary it cannot be read to establish her claim against Harper. The claim itself may be established by competent evidence. This being done, it is not perceived that Matthews may not prove an assignment to her in satisfaction of her claim, which would not affect Harper, but other creditors of Harper. Hattie's deposition was given on the 16th day of April, 1888. If Harper was then in the penitentiary her deposition cannot be read to establish her claim against him. The exceptions will be retained and on the trial the testimony to which objection is made in them will be tried by the principles stated in this judgment and order.

And at the same term of the court, on the 5th day of Sept., 1888, the following order was made, to wit:

*Order: Lloyd, Tr., Off'd Am'd Ans. to Am'd Ans. & X Pet'n of Mathews, &c., & Mathews, &c., Object, & on Mo. Lloyd, Tr., & Mathews, &c., Subm't'd on Offer to File Same & on Whole Case.*

Came Lloyd, trustee, and offered an amended answer to the amended answer and cross-petition of Matthews, Otten, &c., to the filing of which Matthews, Otten, &c., object, and on motion of Lloyd, trustee, and Matthews & Otten, &c., this cause is submitted on the offer to file same and on the whole case.

The amended answer of Lloyd, trustee, to amended answer and cross-petition of Matthews, Otten, &c., referred to in foregoing order is in words and figures as follows, to wit:

*Am'd Ans. of Lloyd, Tr., to Am'd Ans. & X Pet'n — Mathews & Off'd Sept.* 5, '88.

Campbell Chancery Court.

ALBERT SILVA *vs.* FIDELITY NATIONAL BANK, &c. } Amended Answer to X Petition — Matthews.

The defendant Lloyd, trustee of E. L. Harper, says that he denies that on the 21st day of June, 1887, when it is alleged that Harper

transferred the said shares of stock as alleged in the amended answer and cross-petition of Matthews and Otten filed January 4th, 1888, that there was due something over $7,000.00 on said note from Harper to Matthews. He denies that there was anything whatever or any sum due from Harper to Matthews on said note at said time. He denies that at the time of the alleged transfer of said stock the said building association shares were only worth the sum of $4,188 88, or that said Harper now owes the said Matthews over at least $3,000.00 yet on said indebtedness after crediting said stock. There was nothing due on said note at said time. The shares of stock were worth at said time $4,914.87.

C. L. RAISON, JR.,
*Att'y for Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell County.* }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney of Harlan P. Lloyd, trustee, who is now absent from
27 this county and State, and that he believes that the statements of the foregoing amended answer are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 4th day of September, 1888.

JOHN P. SCHROLL, *Cl'k*,
By A. L. RENSCHER, *D. C.*

And thereafter, at the same term of the court, on the 7th day of September, 1888, judgment was rendered in words and figures as follows, to wit:

*Judgment.*

The said fund accrued and arising upon said 20 shares of stock of said building association involved in these causes belongs to said Lloyd, trustee, to be administered for the benefit of the creditors of E. L. Harper, and it is adjudged by the court that all the actions and cross-actions in this consolidation other than the cross-action of the said Lloyd, trustee, be, and they are hereby, dismissed at the costs respectively of the parties suing, and the attachments are discharged.

It is also adjudged by the court that said Lloyd, trustee, is the owner of and entitled to the immediate possession of said "pass book" of E. L. Harper in said building association, filed by said Matthews and Otten with their cross-petition herein, and the clerk of this court will deliver the said "pass book" to the said Lloyd, trustee. The said shares of stock in the building association of said Harper amounted, in the amounts paid in and the dividends thereon, on the 13th day of July, 1887, when the same became converted into a money demand against the association, to the sum of $4,914.89.

28 *Mathews & Otten Except; Appeal to Court of Appeals Prayed & Granted.*

It is adjudged that Lloyd, trustee, recover of the Fidelity Building, Savings & Loan Company for the sum of $4,914.89, without interest, and when said sum is paid said Lloyd, trustee, will deliver said "pass book" to said association. The said Lloyd, trustee, will pay the costs of these proceedings, other than the costs adjudged against the parties, other than said Lloyd, trustee. Hattie A. Matthews and John Otten except to this judgment and pray an appeal to the court of appeals, which is granted.

The depositions for defendant Hattie A. Matthews, marked "1888, May 3rd," received from hands of ex. and filed, are in words and figures as follows, to wit:

*Dep'n for Hattie A. Mathews.*

Notice.

Campbell Chancery Court.

ALBERT SILVA
*vs.*
FIDELITY NATIONAL BANK, Def'ts. } Notice to Take Depositions.

& consolidated cases.

Defendant Hattie A. Matthews will take depositions on Monday, April 16, 1888, at the office of John S. Ducker, Newport, Kentucky, to be read as evidence on her behalf on the trial of the foregoing cause, and if not completed on that day to continue from day to day till completed.

JNO. S. DUCKER,
*Att'y for Def't Hattie A. Matthews.*

Notice accepted April 4th, 1888.

C. L. RAISON, JR.,
*Att'y for Harlan P. Lloyd, Trustee*
29 *Individual Estate of E. L. Harper.*

*Dep'n of Hattie A. Mathews.*

The deposition of Hattie A. Matthews, taken, pursuant to notice filed herewith, at the office of John S. Ducker, Newport, Ky., April 16th, 1888, to be read as evidence in behalf of defendant Hattie A. Matthews on the trial of the case of Albert Silva *vs.* Fidelity National Bank and consolidated cases, now pending in the Campbell chancery court.

1st. State your name and residence and what connection, if any, you have with this suit.

Ans. Hattie A. Matthews, Cincinnati, Ohio, and am a defendant to this suit.

2nd. Please examine the exhibit filed with the amended answer and cross-petition of Hattie A. Matthews in this case, filed on January 4th, 1888, and state whether or not you are the Hattie A. Matthews mentioned in the exhibit (or note) and, if yes, how much money did E. L. Harper owe you on the date that note was given, to wit, August 8th, 1881.

Ans. I am the Hattie A. Matthews, and E. L. Harper owed me on that date $5,000.00.

3rd. What, if anything, has been paid on that note since it was given, not considering the building association stock, the subject of the controversy in this suit?

Ans. Interest to January 1st, 1882.

4th. What was that money owing to you by E. L. Harper for?

Ans. Money I loaned him.

5th. When did you loan that money to Mr. Harper with reference to the time he gave you the note?

Ans. At the same time.

30 6th. What conversation, if any, did you have with Mr. Harper at any time before the 21st day of June, 1887, in regard to his transferring his shares in the Fidelity Building Association of Newport, Kentucky, on the claim you held against him?

Ans. Between the 14th and 16th of June, 1887, Mr. E. L. Harper told me he would transfer the building association shares as part payment on the note. I lived with him in Cincinnati, and Mrs. Harper is my sister. He told me this at his home.

7th. What, if anything, did Mr. Harper ever mention to you at any other time about this matter?

Ans. Nothing.

8th. When did you learn for the first time that Mr. Harper had transferred this stock to you and through whom did you learn it?

Ans. By my brother, J. H. Matthews, and before the assignment of E. L. Harper.

*X Exam.*

Cross-examination by RAISON, att'y for Lloyd (trustee), assignee:

1st. How long before Mr. Harper's assignment was it Mr. Matthews told you Mr. Harper had transferred the stock to you? Give the exact date, as near as you can remember.

Ans. I don't remember the exact date.

2nd. You say that your brother told you of the transfer of this stock to you before the assignment of E. L. Harper for the benefit of his creditors. Now, how long was it before that your brother told you this?

Ans. I don't remember.

3rd. Approximate the time, can't you?

Ans. I don't remember at all.

31 4th. Have you no idea whatever of the time as to days or weeks?

Ans. It couldn't have been weeks.

5th. Is it not a fact that it was some time after the time E. L. Harper made his general assignment for the benefit of his creditors that your brother told you that Mr. Harper had transferred the stock in the building association to you?

Ans. It was a short time afterwards.

6th. What do you mean when you say that Mr. Harper transferred the stock in the building association to you; what stock did he transfer, in what building association was it, and where is the transfer you speak of? Is it in writing or was it a verbal transfer?

Ans. On part payment of my note; stock in the Fidelity Building Association. It was a verbal transfer.

7th. In answer to question 6 in your examination-in-chief you say that between the 14th and 16th days of June, 1887, E. L. Harper told you he would transfer the building association stock to you as part payment of the $5,000.00 note. Now, what reason did he give to you at that time? Give the whole conversation and all that Mr. Harper said about the matter at that time.

Ans. That he would pay me the building association stock as part payment on the money that I loaned him. That was the whole conversation.

8th. You were living at his house at the time, I believe. How long had you been living there?

Ans. Ten years.

9th. You were living there as a member of his family, were you not?

32 Ans. Yes, sir.

9th. When did you say that you loaned Mr. Harper the $5,000.00?

Ans. August 8th, 1881.

10th. Where did you get that $5,000.00, Miss Matthews, from whom did you get it, and when?

Ans. In 1880 I received a share of my mother's estate.

11th. How much money did you get from your mother's estate? State the amount.

Ans. A little over $1,000.00.

12th. Where did you get the other $4,000.00?

Ans. Through Mr. Harper.

13th. When did he give it to you, and did he give it to you all at once?

Ans. It was the investment that he had made for me.

14th. What investments did he make for you, and when? Tell about it.

Ans. In the latter part of 1880. I don't remember what the investments were.

15th. How many investments were there, and what was the amount of the investment or investments?

Ans. I don't know how many investments there were. He invested a little over $1,000.00 for me.

16th. What time in the year 1880 did you receive this money from your mother's estate?

Ans. In November or December.

17th. Now, from whom did you receive it—that is, what person paid or sent it to you, if it was sent to you?

Ans. I don't remember who.

33 18th. When did your mother die, and where?

Ans. 1871; Urbana, Ohio.

19th. Did she leave little or much estate, and who settled up her estate, if you know?

Ans. She did not have a great deal, and that was to be divided equally among us children. My father settled it up.

20th. Did she leave a will or not?

Ans. She left a will.

21st. Who was the executor under your mother's will?

Ans. I don't know.

22nd. Did you ever have this $5,000.00 you say you loaned to Mr. Harper in your possession at any time; if so, when and for how long?

Ans. I never did.

23rd. Did you ever receive any shares of stock on pass book in the building association you speak of from Mr. Harper, either before or after his assignment, on June 21st, 1887?

Ans. I never saw it.

24th. You have filed book No. 32, in name of E. L. Harper, for 20 shares of stock in the Fidelity Building, Savings & Loan Co. of Newport, Ky., with your answer and cross-petition in this case; now, when was the first time you ever saw that book and where, and who had it?

Ans. To-day is the first time I ever saw it; in the office of Mr. Ducker, where these depositions are being taken.

25th. Then you don't know much about it, do you, Miss Matthews?

34 Ans. Only what I have heard.

26th. Where did Mr. Harper live, and how long had he lived there prior to June 21st, 1887?

Ans. In Cincinnati, Ohio. He lived there 17 years.

Re-ex.:

1st. You say that you have seen the pass book filed with your pleadings for the first time to-day; did you know of the existence of the book?

Ans. I did.

2nd. Who had possession of the book, if you know, before it was handed to Mr. Ducker, your attorney?

Ans. I don't know.

3rd. Please examine the writing in the first part of that book and state if you know from the handwriting who wrote the name E. L. Harper.

Ans. E. L. Harper himself.

4th. Are the other written words in that assignment in the handwriting of E. L. Harper?

Ans. No, sir; they are not.

5th. In the answer to one of your questions on cross-examination,

question 6, you say, in speaking of the transfer of the Fidelity Building Association stock, "it was a verbal transfer;" when you stated that did you refer to the writing in that book or to the conversation you had with Mr. Harper?

Ans. To the conversation I had with Mr. Harper that I have already spoken of early in the examination.

6th. You say you received the money from your mother's
35 estate in November or December, 1880; how old were you at that time?

Ans. I was passed 19.

7th. Where were you making your home at that time?

Ans. At Mrs. E. L. Harper's, in Cincinnati, Ohio.

8th. When you got your money, which you speak of, from your mother's estate how long did you keep it in your own hands?

Ans. A short time; I don't remember how long.

9th. What, if anything, do you remember about how you came to let Mr. Harper have it; about what was said by you or him at that time?

Ans. Nothing further than I requested him to take it and invest it for me.

10th. What, if anything, do you remember about the execution of the note the August following for $5,000.00? What was said, if anything, by Mr. Harper to you about the accumulations and earnings of the money you had let him have the previous Nov. or December, amounting to the full sum of $5,000.00, for which he gave you the note?

Ans. I don't remember of his saying anything; he gave it to me at his home.

11th. Can't you remember any talk between you and Mr. Harper about the matters referred to in the last question above, explaining how the something over $1,000.00 you had let him have the latter part of 1880 had grown to $5,000.00 in August, 1881; if so, what?

Ans. The investments he had made for me of this $1,000.00 and over he was willing to settle for $5,000.00.

36 12th. Miss Matthews, have you ever had a suit in court before?

Ans. I never had one and don't want another.

13th. Have you ever been a witness before?

Ans. I have not.

Recross-examination:

—. You loaned your money in 1880 to Mr. Harper and he was to pay you 8 % interest per annum for the use of it, was he not?

Ans. Yes, sir.

2nd. Did you have possession of the $5,000.00 note all the time until you filed it in this case?

Ans. From 1881 till this last June.

Adjourned till April 17th, 1888.

E. P. SIMMONS,
*Ex'r C. C., Ky.*

Met pursuant to adjournment and continued the examination of Miss Hattie A. Matthews.

Redirect:

1st. Was that agreement to pay 8 % made when Mr. Harper first got the money, in November or December, 1880, or when he gave you the note, in August, 1881, which?

Ans. When he gave me the note, in 1881.

HATTIE A. MATTHEWS.

2nd. It is hereby agreed and admitted by Miss Hattie A. Matthews and Lloyd, trustee of E. L. Harper, that E. L. Harper made a deed of general assignment of all his property, real and personal, for benefit of all his creditors, on the 21st day of June, 1887, and that E. L. Harper was subsequently to his assignment, to wit,
37 & 38 June 21st, 1887, indicted by a grand jury in the circuit court of the United States for the southern district of Ohio, western division, for felonious and fraudulent misappropriation of the funds, monies, property, and effects of the Fidelity National bank, of which he was at the time the said acts were committed vice-president, and that said Harper was subsequently tried before a jury and convicted of the said acts complained of, and that he was thereafter by the United States court and the judge thereof sentenced to confinement in the Ohio penitentiary for a period of ten years from the — day of ——, 1888, and that in pursuance thereof he is now confined in the State of Ohio penitentiary at Columbus, Ohio, serving out said sentence of imprisonment.

LLOYD,
*Trustee of E. L. Harper.*
By C. L. RAISON, JR., *His Att'y.*
JOHN S. DUCKER,
*Att'y for Hattie A. Matthews.*

Also the deposition of Mrs. EMMA HARPER, taken at the same time and place and in the same behalf.

*Dep'n of Emma F. Harper.*

1st. State your name and residence.

Ans. Mrs. Emma Harper; live in Cincinnati, Ohio.

2nd. What relation, if any, are you to Mr. E. L. Harper?

Ans. I am his wife.

Counsel for Lloyd, trustee, objects to the further taking of testimony of Mrs. Harper because she is the wife of E. L. Harper, who is a party to this suit, and is incompetent as a witness either
39 for or against said Harper or against said Lloyd, trustee of E. L. Harper, in this proceedings.

C. L. RAISON, JR.,
*Att'y for Lloyd, Trustee.*

3rd. What relation, if any, are you to the defendant in this case?

Ans. Sister.

4th. What estate, if any, did Miss Matthews get from the estate of her deceased mother, when did she get it, and what did she do with it? Tell all that you know about it.

Ans. Something over $1,000.00, in the fall of 1880. She gave it to Mr. Harper to invest at about the same time. I know that he invested it in pork, and it was turned over two or three times and amounted to over $4,000.00, and he made it even $5,000.00—that is what Mr. Harper told me—and gave the note for that amount when he settled with her.

5th. Mrs. Harper, if you know, what was the financial condition of Mr. Harper when that note was given, in 1881?

Ans. I know he was able to give it and several times the amount.

6th. Wasn't he worth a great deal of money at that time?

Ans. Yes, sir.

7th. What, if anything, do you know of any arrangements between your sister, Miss Matthews, and Mr. Harper previous to Mr. Harper's assignment, June 21st, 1887, in regard to his transferring his Fidelity Building Association stock in Newport, Kentucky, on his indebtedness to her?

Ans. I know that he did have it transferred to her before the failure. I know this because he told me he had.

8th. When did you get that information, before or after the assignment?

Ans. The morning of the assignment.

*X Exam.*

Cross-examination by counsel for Lloyd, trustee:

Ques. 1. What was Mr. Harper's financial condition from, say, the 10th to 21st day of June, 1887—very much embarrassed, was he not?

Ans. Yes; I suppose he was.

2nd. Insolvent, was he not?

Ans. I don't know anything about that.

3rd. What did Mr. Harper say to you was his reason for transferring the stock in the building association to Miss Matthews at that particular time?

Ans. Because he owed her the money.

4th. Did he not say to you that he probably would have to make an assignment on account of financial embarrassments?

Ans. No, he didn't think he would. He didn't think he would fail that day.

5th. What do you know about the liabilities of Mr. Harper in Nov. or December, 1880, or August 1st, 1881?

Ans. I don't know anything about that.

6th. Did you get any money from your mother's estate when Miss Matthews received hers in November, 1880; if not, why not?

Ans. Yes; I received the same amount.

7th. Paid by your father, was it? Did he pay as executor of your mother's estate or otherwise?

Ans. Yes, he paid it as executor.

8th. Did Mr. Harper tell you that he had transferred or
41 that he intended to transfer the building association stock to Miss Matthews?

Ans. That he had through Brother Jim.

9th. Your brother's name is James H. Matthews, is it not?

Ans. Yes.

10th. Now, when do you say that Mr. Harper told you that he had transferred this stock—give the day?

Ans. It was the day that the bank failed. In the morning before the bank failed.

11th. Which failed first, the bank or Mr. Harper; and if the bank failed first, how soon after did Mr. Harper fail?

Ans. I don't know.

12th. Mrs. Harper, look at this note for $5,000.00 that I now hand you and say, if you know, in whose handwriting the pencil memorandum on the back of the note is.

Ans. I am not positive; I think it is Mr. Gahr's.

13th. In whose handwriting is the face of the note, if you know?

Ans. It is all Mr. Harper's.

14th. When did you see this note for the first time, and where and when?

Ans. In Chicago, at the Palmer house, in 1881.

15th. What is your father's full name?

Ans. Silas N. Matthews.

16th. Has the note always been in the possession of Miss Mathews since she received it, in August, 1881, if you know?

Ans. Yes, sir; it always has.

17th. Ever been out of possession any time?

42 Ans. No, sir.

18th. When and where did Mr. Gahr make this pencil memorandum on the back of the note, if you know?

Ans. At my house, before the failure. It must have been a week before. It was several days.

19th. Let me understand just what day Mr. Harper made the transfer of the stock to Miss Mathews. Was the transfer made on the day the bank failed or did Mr. Harper only tell you that day? State fully about this.

Ans. He told me that day that he had had it transferred that morning.

EMMA F. HARPER.

It is hereby agreed between Hattie A. Mathews and Lloyd, trustee of E. L. Harper, that the same statement and agreement of facts as to the indictment, trial, and conviction, sentence, and confinement of E. L. Harper, made and signed and attached to the deposition of Hattie A. Mathews, shall apply to this deposition as fully as if written at length herein.

April 17th, 1888.

LLOYD,
*Trustee E. L. Harper,*
By C. L. RAISON, JR., *Att'y.*
JNO. S. DUCKER,
*Att'y for Hattie A. Matthews.*

Adjourned to Wednesday, April 18th, 1888.

E. P. SIMMONS,
*Ex. C. C. Ky.*

43 Met pursuant to adjournment.

Also the deposition of J. H. MATHEWS, taken pursuant to adjournment and in the same behalf.

*Dep'n of J. H. Mathews.*

1 Ques. State your name, age, residence, and occupation.

Ans. James H. Mathews; 31 years; Newport, Ky.; treasurer of Newport Iron & Steel Co.

2nd. What relation, if any, are you to def't Hattie A. Mathews?

Ans. Am her brother.

3rd. What, if anything, do you know of any estate that Miss Hattie A. Matthews received in her own right? If any, how much, and about when was it, and what did she do with it?

Ans. My sister Hattie received from my mother's estate, as near as I can remember, about $1,000.00, and I think in 1881—I have not refreshed my memory about that—this money was given to Mr. E. L. Harper, and I afterwards learned that he invested it.

4th. How did you learn that he had invested it and in what he had invested it?

Ans. I was down to Mr. Harper's to tea one evening. We were speaking about speculating, &c., and Mr. Harper laughed and asked me if I knew that Hattie owned some pork. I confessed that I did not. He then told me that he had invested Hattie's money in pork, and that it had been a good investment.

Counsel for Lloyd, trustee, objects to so much of the answer as purports to give any statements of E. L. Harper.

5th. When was that conversation with reference to the time that Harper first received her money?

Ans. I don't know how long afterwards it was.

44 6th. What, if anything, do you know of the execution of the note to your sister, Miss Hattie, in August, 1881?

Ans. Nothing of my own knowledge.

7th. What was the financial condition of E. L. Harper on August 8th, 1881, if you know?

Ans. I know that he was considered a rich man, and from my connection with him in business I think he was. He made most of his money in the pig-iron boom of 1879.

8th. Please examine the note now shown you, filed as an exhibit to the amended answer and cross-petition of Hattie A. Matthews, filed January 4th, 1888, and state if you know whose handwriting it is in.

Ans. It is Mr. E. L. Harper's handwriting.

9th. Please examine the building association book, filed as an exhibit to the petition of Hattie A. Mathews, filed Jan'y 4th, 1888, and state in whose handwriting the name of E. L. Harper is and in

whose handwriting the written words are above the signature of Harper in what purports to be an assignment of 20 shares of stock in the Fidelity Building, Savings & Loan Co. of Newport, Ky., in the front of the book.

Ans. The signature is in E. L. Harper's handwriting. I saw him write it and am familiar with his handwriting. The written words above his signature are in my own handwriting.

10th. Tell all you know about that transaction.

Ans. Between 9 and 9.30 o'clock on the morning of June 21st, 1887, Mr. Harper came to me in the office of E. L. Harper & Co., Cincinnati, and told me to have Mr. Otten get the building association book from Mr. Scarlett and have the money transferred to his name for Miss Hattie Matthews, as Mr. Otten was
45 familiar with the building association Co. and knew Mr. Scarlett personally and the intention was to have him draw the money for her. Mr. Otten brought me the book, and I then wrote the words filling in the blank in the first part of the book, "J. H. Otten," the word "twenty" and the figures "20" inclosed in brackets, the letter "s" completing the word "shares," the date "21 June" and the figure "7" completing the number "1887." Mr. Otten then took the book to Mr. Harper at the Fidelity National bank for his signature, but was refused admittance to the bank. He brought the book back to me, stating they would not admit him, so I took the book and gained admittance to the bank on the ground of being a director. Mr. Harper signed the book in my presence and I returned it to Mr. Otten. This happened not later than ten a. m.

Counsel for Lloyd, trustee, objects to so much of the above answer of the witness as purports to detail any acts or statements of E. L. Harper.

11th. What, if anything, did Mr. Harper say in the talk he had with you about owing Miss Mathews anything?

Ans. Nothing to me at that time.

12th. What connection, if any, did Joseph H. Scarlett have with the building association, if you know?

Ans. He, I believe, was an officer of the association and was, I believe, instrumental in getting Mr. Harper to take 20 shares in the association at the start. Mr. Scarlett sent his boy to Mr. Harper on the first Thursday in each month to collect the
46 dues on the 20 shares for the month, bringing the book with him, and was given a check, which he took with the book to the office of the association at their regular meeting, and generally kept the book in his possession till the next month.

13th. What time in the day on the 21st of June, 1887, did E. L. Harper make his assignment for the benefit of his creditors?

Ans. At two o'clock p. m.

*X Exam.*

Cross-examination by counsel for Lloyd, trustee:

Ques. 1. Please look at the note of $5,000.00, dated August 8th, 1881, filed by Hattie A. Mathews with her answer and cross-petition

herein, and say, if you know, in whose handwriting the pencil memorandum on the back of the note is.

Ans. It is Mr. Harper's; the pencil and ink both. The figures here, 7,188.88, are not in his handwriting.

2nd. Mr. Harper was contemplating the immediate making of his assignment for the benefit of his creditors at the time he put his name to the transfer of shares in building association to Mr. Otten, was he not?

Ans. I can't say what he expected to do; don't know.

3rd. Was it not generally understood in the office where you were employed that Mr. Harper was financially embarrassed and would probably have to make an assignment that day, to wit, June 21, '87?

Ans. Yes; we suspected it. The Swift's iron & steel works on account of the bank closing would have to make an assignment because they would be called on to pay more money than they could. What Mr. Harper's condition or the condition of E. L. Harper & Co. was I am unable to state of my knowledge then.

47 4th. Can you state just the time Mr. Harper put his signature to the transfer in the building association book? Give me the exact time, as near as you can.

Ans. It was ten o'clock, as near as I can tell.

5th. Did you see Mr. Harper sign his deed of assignment? If so, what was the hour?

Ans. I can't state positively that I saw Mr. Harper sign his deed of assignment, but it was signed at the same time as that of Swift's iron & steel works and E. L. Harper & Co.; about 2 o'clock on June 21, 1887.

6th. Where were the signatures made, if you know?

Ans. In the Fidelity National bank, Cincinnati, Ohio.

7th. Who was present, if you know?

An-. Judge Jordon and I were present at the signing of the papers.

8th. When Mr. Harper told you to fill out the blanks in the building association book, what reason did he give you why it should be done on that particular day and in the hurried manner in which it was done?

Ans. I suppose he thought there was necessity for haste.

9th. What was the necessity, if you know?

Ans. I supposed that Mr. Harper knew that he had to make an assignment, although I didn't know it.

10th. When did your mother die, and did she leave a will; and, if so, who was her executor?

Ans. She died about 1872 or 1873. She left no will that I know of.

11th. Who paid the $1,000.00 to your sister, if you know?

Ans. My father brought the money to Cincinnati, Ohio,
48 and it was there divided. My impression was it was a little less than $1,000.00, but very close to it.

J. H. MATHEWS.

Also the deposition of J. H. OTTEN, taken at the same time and in the same behalf.

*Dep'n of J. H. Otten.*

1st. State your name, age, residence, and occupation.

Ans. J. H. Otten; 37 years; Maplewood, Ohio, and a book-keeper.

2nd. Please examine the building association book filed with the pleadings in this — of Hattie A. Mathews, &c., January 4th, 1888, and state when you first saw it.

Ans. I know by this date in here that it was the 21st of June, 1887; that is the only way I can recollect it.

3rd. Where did you see it first?

Ans. I got it from Mr. Scarlett at the Burnet house; Joseph H. Scarlett.

4th. Where did you take it to?

Ans. I went up to Duhme's to see the secretary of the association.

5th. And then where did you go?

Ans. I then went to the Fidelity National bank, Cincinnati, Ohio, and was refused admission, and then went down to the office of Swift's iron & ste-le works, *H.* W. 3rd street, and handed the book to Mr. Mathews and he went up to the Fidelity National bank and got in and came back and brought the book with him.

6th. What did you go to the Fidelity National bank for?

Ans. I went there to get Mr. Harper's signature to the transfer of the 20 shares in the Fidelity Building Association to me.

49 7th. When Mr. Mathews took the book and went away and returned and gave you the book, was Mr. Harper's signature to the assignment of the stock?

Ans. It was.

8th. What time was this?

Ans. I would put it not later than twenty-five minutes of ten in the morning.

9th. For whom did you receive this assignment of stock?

Ans. Miss Hattie Mathews.

10th. Name the persons who told you in what shape and form to put the assignment in.

Ans. Joseph H. Scarlett.

11th. To whom did you take the book with the assignment after you got it?

Ans. To the secretary of the building association at Duhme's.

12th. Did you get the money on this stock of Mathews; and, if not, why not?

Ans. I notified the association in writing that I wished to withdraw from the association and I wanted to draw all the money out; they notified me in writing that they would not allow me to draw this money out. This letter states that it was done by the advice of the attorney of the building association because Mr. Harper had made an assignment.

*X Exam.*

Cross-examined by counsel for Lloyd, trustee:

Ques. 1. Where did E. L. Harper and Hattie A. Mathews live on the 21st day of June, 1887, and where had they been living for one year prior thereto, if you know?

50 Ans. 371 West Fourth street, Cincinnati, Ohio, I think. To my knowledge they had lived there four yours. Miss Mathews lived with Mr. and Mrs. Harper.

2nd. When did the pass book No. 32 filed by Miss Mathews in her answer herein, of which you have spoken in your examination-in-chief, finally leave your possession and to whom did you give it?

Ans. It was in the first part of July, 1887. I gave it to Mr. Nelson.

3rd. Was it in your possession entirely from the 21st day of June, 1887, until you gave it to Mr. Nelson in July, 1887?

Ans. No, sir.

4th. Who had it besides yourself?

Ans. The secretary of the building association.

5th. When did you give it to the secretary and when did he return it to you?

Ans. I gave it to him on the Thursday following the bank failure. I think it was a week or so later I got a postal card asking me to call there and get the book—at Duhme's.

6th. What did you give Mr. Harper or any one for him in consideration of the transfer of the 20 shares of stock in the building association by him to you, if any?

Ans. Not a cent.

7th. What interest, if any, did you ever have or do you now have any in the 20 shares of stock transferred to you by Mr. Harper?

Ans. None for myself personally except as protector for Miss Mathews.

8th. Has there ever been any transfer made by you to

51 Miss Mathews or any one else of the 20 shares of stock transferred to you by Mr. Harper and is the same now in your name?

Ans. The same is now in my name, and there has never been no transfer made to her.

9th. Was there any transfer of the shares of stock made on the books of the building association from Mr. Harper to you, if you know?

Ans. No, sir; there was not. The building association refused to make transfer to me.

10th. When you attempted to get the shares of stock transferred to you on the books of the building association or demanded a withdrawal from the association and the payment of the money to you, you did so in your own name, did you not, and did you give any intimation to the association that any other than yourself had any interest in the stock or money you demanded from the association?

Ans. When I asked for this money the demand was written. I told Mr. Scarlett who I wanted it for, and I also told the secretary, Ed. Morris, both, that not a dollar of it belonged to me; that I was acting for Miss Mathews.

11th. Is it not a fact that E. L. Harper at the time he signed his name in the pass book was insolvent and was contemplating the making of the assignment which he subsequently made on the same day? Tell all you know about it.

Ans. Not of my knowledge. If I had known I would have drawn my salary sooner. I drew it on the same day after I got the book.

12th. Why did you draw your salary on that day? Was
52 that your usual pay day?

Ans. I had no pay day. I drew whenever I wanted to. I was then working for Swift's iron & steele works. When I got up to the bank I saw the crowd there. I thought I had better be getting a little salary.

13th. What directions, if any, did E. L. Harper give to you as — the collection of the money from the association and paying the same to Miss Mathews?

Ans. I never saw E. L. Harper before the book was signed about this matter, and had no conversation with him, but did afterwards. I got my directions from Mathews. He gave me no directions from him at that time, but several times thereafter.

Redirect:

1st. When Joseph A. Scarlett told you how to fix the transfer of the building association stock, did he know you were doing it for Miss Mathews?

Ans. He did; I told him.

J. H. OTTEN.

Adjourned to Thursday, April 19th, 1888.

E. P. SIMMONS,
*Ex. C. C. Ky.*

Met pursuant to adjournment and continued the examination and in the same behalf.

Also the deposition of ALBERT P. GAHR, taken pursuant to adjournment and in the same behalf.

*Dep'n of A. P. Gahr.*

1st. State your name, age, residence, and occupation.

Ans. Albert P. Gahr; 24 years old; Cincinnati, Ohio; secretary of the Newport Iron & Steele Co.

53 2nd. Please examine the note filed as an exhibit with the amended answer and cross-petition of Hattie A. Matthews, &c., filed Jan'y 4th, 1888, in this case, and state if you ever saw that paper before; and, if so, when you first saw it.

Ans. I have examined the note referred to and had seen it pre-

viously. The first time I saw it was on the night of June 16th, 1887, at the house of E. L. Harper, where it was handed to me by Miss Hattie A. Mathews for the purpose of computing the interest up to that date. Mr. Harper was present and stated to me that he desired to protect his indebtedness to Miss Mathews and desired that I should compute the amount due at that time. Thereupon Miss Mathews produced the note, I made the calculations desired, and endorsed the amount, $7,188.88, on the back of the note in pencil marks. On examining the note I find the figures endorsed thereon and recognize and identify them as made by me.

Counsel for Lloyd, trustee, objects to all that portion of the answer of the witness which purports to detail any acts, statements, or conversation of E. L. Harper.

3rd. At that interview what, if anything, was said by Mr. Harper in regard to transferring to Miss Mathews any stock in the Fidelity Building Association of Newport, Kentucky?

Ans. Mr. Harper stated that he wished and intended to transfer his interest in the Fidelity Building Association to Miss Mathews to partially secure his indebtedness to her.

4th. Please state, if you know, what handwriting the words and figures in pencil on the back of the note are other than the
54 figures you made you spoke of.

Ans. With the exception of the figures "$7,188.88," which I have identified as mine, the remainder of the endorsements on the note in pencil are the handwriting of E. L. Harper.

5th. At the time you made those figures, "$7,188.88," on the back of the note, what other endorsements were on the back of it?

Ans. The only endorsement on the note at the time I made the endorsement were the words "interest paid on the within note to January 1st, 1887;" in ink, in the handwriting of E. L. Harper.

6th. What was the financial condition of E. L. Harper, if you know, in August, 1881?

Ans. I was connected with him at that time, and I believe that he was fully solvent on the date mentioned.

7th. About what time, if you remember, in the day on the 21st of June, 1887, did E. L. Harper make his assignment for the benefit of his creditors?

Ans. I do not know the exact time. It was the fore part of the day, if my recollection is correct.

8th. Don't you remember, Mr. Witness, that the assignment of E. L. Harper, E. L. Harper & Co., & Swift's iron & steele works were all made at the same time, about 2 o'clock in the afternoon of June 21st, 1887?

Ans. I was not present when E. L. Harper put his signature to either of the documents referred to. The assignment of Swift's iron & steele works was brought to me for signature at the office of Jordon & Jordon, about 11 o'clock, on June 21st, 1887, with the signature of E. L. Harper appended at that time.

55 9th. Then you don't know what time in the day the individual assignment of E. L. Harper was made?

Ans. I do not.

*X Exam.*

Cross-examination by counsel for Lloyd, trustee:

Ques. 1. But the assignment of E. L. Harper was made in the forenoon of the day of the 21st of June, 1887, was it not?

Ans. I do not know, as I was not present when executed, and could only state my impression, which I gave in answering a similar question on direct examination.

2nd. Did you not hear before noon of that day of the fact that E. L. Harper had made an assignment for benefit of his creditors?

Ans. No, sir.

3rd. Did you or not know as early as the 16th day of June, 1887, that E. L. Harper was so much embarrassed financially that he must of necessity make an assignment for benefit of his creditors within a very few days from that date? State all you know about it.

Ans. Mr. Harper told me about 9 a. m. on June 16th, 1887, that he was financially ruined, and that a general assignment was simply a question of hours or of a few days at most.

A. P. GAHR.

CAMPBELL COUNTY, }
*State of Kentucky.* }

I, E. P. Simmons, examiner for Campbell county, certify that the foregoing depositions of Hattie A. Matthews, Mrs. Emma F. Harper, James H. Matthews, John H. Otten, and A. P. Gahr were taken before me at the time and place stated in the caption and
56 adjournments herein; that said witnesses were duly sworn before giving them; that they were written by me in their presence and read and subscribed by them in my presence; that defendants Mathews and Lloyd were present in person part of the time and by attorney all of the time.

Given under my hand this 19th day of April, 1888.

E. P. SIMMONS,
*Ex. C. C., Ky.*

And thereafter, to wit, on the 24th day of September, 1888, schedule was filed in words and figures as follows, to wit:

*Schedule.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ff, }
*vs.* }
FIDELITY NATIONAL BANK, &c. }

Schedule of record to be copied for court of appeals, to be used on behalf of Hattie A. Mathews and John H. Otten on appeal.

1st. All orders on Hattie A. Mathews' branch in the case, from and including the order showing filing of petition of Hattie A. Mathews, &c., to be made a party down to and including final judgment against Hattie A. Mathews at Sept. term, 1888.

2nd. Copy of exhibit filed with petition of Hattie A. Mathews and Otten Jan. 4th, 1888; amended answer and cross-petition of Hattie A. Mathews and J. H. Otten, filed Jan. 4, 1888.

3rd. Reply and answer of Lloyd, filed Jan. 4, 1888; amended answer and set-off of Lloyd, filed May 7, 1888; reply of
57 Hattie A. Mathews, filed May 18, 1888; exception of Lloyd, trustee, filed May 9th, 1888; copy of motion of Lloyd to strike depositions from file, filed May 7th, 1888; depositions filed May 3rd, 1888, to be used on behalf of Hattie A. Mathews and John H. Otten.

JNO. S. DUCKER,
*Att'y for Hattie A. Mathews & J. H. Otten.*

And on the same day, to wit, on the 24th day of September, 1888, notice was filed in words and figures as follows, to wit:

*Notice.*

Campbell Chancery Court.

ALBERT SILVA, Pl'ff,
*vs.*
FIDELITY NATIONAL BANK, &c., Def't. } Notice.

Defendant Harlan P. Lloyd, trustee, will take notice that the defendant and cross-petitioner, Hattie A. Mathews, and J. H. Otten, have this day filed a schedule of record in the above case in the clerk's office of the above court, to be copied for them, to be used on appeal by them in the court of appeals of Kentucky from a judgment rendered against them and in favor of the said Harlan P. Lloyd, trustee, at the September term, 1888, of the above court.

Sept. 22nd, 1888.

JOHN S. DUCKER,
*Att'y for Hattie A. Mathews & J. H. Otten.*

Notice accepted this 24th day of September, 1888.

C. L. RAISON, JR.,
*Att'y for H. P. Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell Chancery Court.* }

58 I, John C. Schroll, clerk of the chancery court, do hereby certify that the foregoing 80 pages of written matter and this page contain a full, true, and complete transcript of the record and proceedings in the within-styled action as called for by the schedule filed herein and as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand as clerk this 1st day of November, 1888.

JOHN C. SCHROLL, *Cl'k,*
By A. L. RENSCHER, *D. C.*

Upon the filing of the foregoing transcript the appellants filed the following statement of parties, to wit:

*Transcript Filed. Court of Appeals. Statement of Parties.*

Court of Appeals of Ky.

HATTIE A. MATHEWS and J. H. OTTEN, Appellants,
*vs.*
H. P. LLOYD, Assignee of E. L. Harper, and FIDELITY BUILDING ASSOCIATION, Appellees.

Judgment appealed from was rendered at the Sept. term, 1888, of the Campbell chancery court and is found on pp. 35–'6 of the record.

JNO. S. DUCKER,
*Att'y for Appellants.*

Afterwards, at a court of appeals held on the 12th day of March, 1889, the following order was entered herein, to wit:

*Order: Continued for Oral Argument.*

Ordered that this cause be continued for oral argument.

59 Afterwards, at a court of appeals held on the 24th day of October, 1889, the following order was entered herein, to wit:

*Order: Cause Heard.*

This cause came on and was heard.

Afterwards, at a court of appeals held on the 27th day of Feb., 1890, the following order was entered herein, to wit:

*Judgment C't of Appeals.*

The court being sufficiently advised, it seems to them that the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded with directions to render a judgment in conformity to the opinion herein, which is ordered to be certified to said court. It is further considered that appellant recover of appellees costs herein.

Afterwards, at a court of appeals held on the 1st day of April, 1890.

*Order Extending Time for Filing Pet'n for Rehearing 20 Days.*

On motion of appellee, by counsel, the time for filing a petition for rehearing herein is extended 20 days.

*Motion by Appellant Filed to Reduce Time for Filing Pet'n to 15th Ap'l, 1890, & Motion Submitted.*

Afterwards, at a court held on the 5th day of April, 1890, came appellant, by counsel, and filed notice and grounds and moved the court to modify the order extending time to file a petition for rehearing 20 days, so as to give only to April 15th, 1890, to file said petition; to which motion the appellee filed a reply and the motion is submitted.

*Grounds & Motion to Modify Order Extending Time, &c.*

Kentucky Court of Appeals.

APRIL 5TH, 1890.

HATTIE A. MATHEWS, &c., Appellants,
*vs.*
H. P. LLOYD, Appellee.
} Motion.

The appellants now come and move the court to modify
60 the order made in this case on the 1st day of April, 1890, giving appellee 20 days further time to file a petition for rehearing, so that the same shall not extend beyond the 15th of April, 1890, for the following reasons, to wit:

1st. Appellants say that this motion could have been filed on the 25th day of March, 1890, because the counsel for appellee was present with the counsel for appellants in Frankfort, Kentucky, on that day and in the clerk's office of this court.

2nd. The appellee has had ample and sufficient time to have filed the petition for rehearing herein.

3rd. The first day of the May term of the Campbell chancery court meets on the 5th day of May, 1890, and the next term thereafter is on the first Monday in September, 1890. The extension of the time for filing the said petition of 20 days makes it impossible for this court to pass on the petition so as to enable the appellants, in case the petition is overruled, to have the judgment entered at the May term, 1890, by reason of subsection 2 of section 761 of the Civil Code, and would thereby unnecessarily postpone the final judgment in the case, ordered by the opinion, until the fall of 1890, for which reasons appellants ask that the time given be limited to the 15th of April, 1890.

JNO. S. DUCKER,
*Attorney for Appellants.*

61 *Response to Motion to Reduce Time for Filing Petition for Rehearing.*

Kentucky Court of Appeals.

HATTIE A. MATHEWS, Appellant,
*vs.*
HARLAN P. LLOYD, Trustee, Appellee.
} Response to Motion to Reduce the Time of Appellee for Filing Petition for Rehearing.

The respondents, Harlan P. Lloyd and C. L. Raison, Jr., attorneys for appellee, for response to the motion of the attorney of the appellant say that the time granted by the court for the filing of the petition for rehearing in this case is not unusual or extraordinary, but, considering the nature of the case and the questions involved, is quite short, and they resist and object to any reduction thereof; that while it is true that C. L. Raison, Jr., was in the city of Frankfort in attendance of the superior court, he was there for the purpose of and did argue two cases in said court, and since his return home has written and filed in said court briefs in the cases so argued by him. Respondents say that in the petition for rehearing in this case they desire to present to the court some very important points, some of which will raise Federal questions which they will ask this court to pass upon. These matters will require an elaborate and extensive examination of the authorities bearing upon them in order that the points raised and to be determined by the court may be clearly and concisely presented by counsel, and respondents both say that their present engagements are such as to render it impossible for
62 them to give the proper and necessary time and attention to the careful examination of the law and preparation of their petition for rehearing in this case within less time than the twenty days granted to them by this court. Respondents are inclined to the opinion, with all due deference to this court, that the court in its opinion in this case has misconstrued the law of the State of Ohio bearing upon and by which this case should be governed in the view of respondents, and to this matter they wish to call the particular attention of the court.

Respondents have no wish or desire to delay the case in any manner, and do not resist this motion upon such ground, but because they believe it necessary and essential to their clients' interest that they should have all the time allowed them, and they most respectfully resist the granting of the motion of the appellant, and ask that it be overruled.

Respectfully submitted.

H. P. LLOYD,
C. L. RAISON, JR.,
*Att'ys for Appellee.*

*Order Extending Time, &c., Modified, & Time until Ap'l 21st Granted.*

Afterwards, at a court held on the 10th day of April, 1890, the court being sufficiently advised, it is considered that the order extending time to file petition for rehearing herein 20 days be so modified as to give time until April 21st only.

Afterwards, on the 21st day of April, 1890, the following petition for a rehearing was filed in the clerk's office of said court:

*Pet'n for Rehearing Filed in Clerk's Office.*

Court of Appeals of Kentucky.

63 HATTIE A. MATHEWS, Appellant,
*against*
HARLAN P. LLOYD, Trustee of Estate of E. L. Harper, Appellee.

Petition of appellee for rehearing of the above cause.

The court, in its opinion rendered in this cause, sustains the contention of the counsel of the appellee that the controversy between the appellant and appellee as to the ownership of the shares of stock in question should be determined by the law of the State of Ohio, the domicile of the parties to the transaction, but is of the further opinion that the statutes, as set out and plead by the appellee in his answer and reply to the petition and cross-petition of the appellant, do not cover and embrace the transaction at bar, and upon this point, with all due deference to the court, we desire to submit a few observations. In order that we may present to the court in a clear and concise manner the view we entertain and desire to call to the especial attention of the court in this petition for rehearing, we have classified the different propositions of law in the following order:

1st. When an insolvent debtor in Ohio determines to surrender the dominion of his property and make a general assignment of all his property for the equal benefit of all his creditors, and subsequently, in pursuance of such determination and purpose, does make such general assignment—

*a.* His right and power to prefer any creditor by any conveyance, transfer, assignment, or payment by any species of in-
64 strument or by any transaction of any kind at once ceases upon the formation in the mind of the debtor of the purpose to make such assignment, and all transactions, transfers, assignments, and all conveyances or payments by which one or any number of creditors are given a preference, either in securing or in payment of a debt, are *void*.

*b.* It is immaterial into how many parts the performance or execution of his determination may be broken, the law will regard all his acts having for their object and effect the disposition of all or any part of his estate as parts of a single transaction, and on the execution of the formal assignment it will, under the statute, draw

to it and the law will regard as embraced within its provisions all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate or any part thereof to his creditors.

*c.* The legal title and ownership of all such property, funds, effects, or choses in action by which any such preference or payment is made or attempted to be made passes to the assignee for the benefit of creditors under and by virtue of the deed of assignment to him, to be administered by him for the benefit of creditors generally under and by virtue of the trust conferred upon him by such deed of assignment.

2. Preferences or payments made or attempted to be made by an insolvent debtor to a creditor in contemplation of insolvency and the making of such general assignment, under the facts and
65 circumstances as above stated, are embraced in and covered by section 6343 of the Revised Statutes of Ohio.

3. Where the title to personal property or choses in action or the legal effect of any transaction, sale, or assignment of personal property or choses in action is drawn in question in a litigation in a foreign court the legal effect of such transaction, sale, or assignment is to be determined by the law of the State of the domicile of the parties where the transaction, sale, or assignment was made, although the property or choses in action may have been at the time of the transaction, sale, or assignment located in a foreign State, where such litigation subsequently takes place.

4. The question between the appellee and appellant as to the title and ownership of the twenty shares of stock in the building association and the legal effect of the transaction between E. L. Harper and Hattie A. Mathews, under and by virtue of which Mathews and Lloyd, trustee, respectively claim the ownership of the said shares, must be governed and controlled by the laws of the State of Ohio; and in determining these matters the same faith, credit, and effect should be given by the courts of Kentucky to the deed of assignment and insolvency proceedings of E. L. Harper and to the laws of the State of Ohio applicable to the transaction between said Harper and Mathews as would be given and applied thereto by the courts of the State of Ohio if this litigation was pending in that State. This is a constitutional right secured and guaranteed to the appellee Lloyd, trustee, by the Constitution and laws of the United States and presents in and to this court a Federal question.

66 5. An appellant in a chancery cause may bring up so much of the record as he deems necessary to the determination of the question involved. He does this at his peril, however, because if upon the hearing it appears that portions of either of the pleadings on the evidence bearing upon the question have been omitted the judgment will be affirmed, as in an ordinary action when all the evidence is not before the appellate court. The pleadings in this cause admit and the evidence clearly shows that E. L. Harper was utterly insolvent and in contemplation of the making of his general assignment of all his property for the equal benefit of all his creditors at the time he made the assignment in the pass

book of the building association of the shares of stock to John Otten, under which transfer Hattie A. Mathews bases her claim to the fund in controversy. It is distinctly alleged in the pleadings of Lloyd, trustee, that at the time Harper attempted to transfer the shares of stock and thereby give a preference to Mathews over his other creditors he was hopelessly insolvent and in contemplation of the making of his general assignment, and that both Otten and Mathews were fully aware of that fact. There is no denial of these allegations. On the contrary, Mathews and Otten in their pleadings expressly admit the fact and say that he intended to give her a preference.

They base their claim and ground their right of recovery in Mathews upon the theory that Harper had a right to so prefer her even under such circumstances. The testimony of Gahr, the
67 confidential clerk and adviser of Harper, plainly shows that Harper knew he was utterly insolvent as early as the 16th of June, 1887, five days before the making of his general assignment. Gahr says that Harper told him at his, Harper's, house, on the morning of June 16th, that he was a ruined man and that a general assignment by him was only a question of hours, days at most. We are warranted in believing from the testimony of James H. Mathews (brother of Hattie A.), John Otten, and A. P. Gahr that even at the very moment of the putting of his signature to the transfer in the pass book his deed of general assignment was in the course of preparation by Harper's lawyers. Mathews says that the deed of assignment of E. L Harper individually and that of the Swift's iron & steele works, of which Harper was president, were signed by Harper at the same time in the Fidelity National bank and in his presence. He fixes the time of the signature as being about two o'clock in the afternoon, but he is evidently mistaken as to the time, for Gahr says that Harper's signature to the deed of assignment of the Swift's iron & steele works as president was appended to that instrument when it was brought to him for his signature as secretary at the office of Jordon & Jordon, Harper's lawyers, and that he, Gahr, signed it before dinner, about half past ten o'clock; that he went to the mills in Newport at once after attaching his signature and remained there all day. It is indeed very questionable under the testimony when Harper signed his name to the transfer in the pass book, whether before or after the execution of his general deed of assignment; but it is clear and beyond
68 all controversy that at the time Harper made the transfer to Otten (or Mathews, as the case may be) he was insolvent and in contemplation of insolvency, and made the assignment of the shares with the intent to prefer Mathews over his other creditors. Under the common law the debtor in the ordinary course of business could prefer a creditor, but we submit that even at common law an insolvent debtor, having determined to discontinue his business, surrender his property, and make an assignment for the equal benefit of his creditors, could not, after the formation of such purpose, lawfully prefer a creditor.

When a man finds that he is so embarrassed financially that he

cannot continue his business, that his assets are not sufficient to pay his liabilities in full, it is honest and commendable in him to provide for the equal distribution of his assets among his creditors; but after arriving at that conclusion and setting out upon the execution of this purpose it is a gross fraud for him to give to one or a number of his creditors a preference over the others. It is a fraud upon the creditors who are left unsecured.

All instruments, conveyances, or payments made after the debtor has determined to make a general assignment and before the final execution of such assignment must be considered, in law and in equity, as one instrument with and as part of the deed of the assignment.

The Supreme Court of the United States, in an opinion by Justice Harlan, reported in the American Law Register, vol. 28, No.
69 6, page 359, and fully annotated by John B. Uhle, construing the Illinois statute relating to assignments, section 13 of which is in substance the same as section 6343 of the Revised Statutes of Ohio (plead by appellee), sustained the proposition contended for by counsel for appellee.

The facts in that case were somewhat different from the case at bar, but the same principles of law govern and control both cases. From the case referred to it appears that Alexander White, Jr., was the administrator of his father, who, when he died, left a very large estate. Alexander converted a large part of the funds of the estate, becoming heavily indebted to his mother, brother, and sisters; finding himself unable to pay the amounts found by the probate court upon final settlement to be due from him to the aforesaid parties, he, on the 16th day of July, 1879, executed two conveyances, one to his sisters (except Margaret) and his brother, James, jointly for part of the lands assigned to him by a decree in partition between himself, mother, and the other heirs, and the other to Margaret for the remaining part. Two days later he executed a bill of sale to mother, brother, and sisters (except Margaret) of his interest in certain pictures which had come into his hands as administrator, and three days thereafter, July 31st, 1879, he *he* executed to his mother a note, accompanied by a warrant of attorney to confess judgment and by a conveyance and transfer of certain real and personal property as collateral security for the note. Subsequently, September 4th, 1879, pursuant to the warrant of attorney, judgment was entered against Alexander White, Jr., in favor of his mother. No
70 money was paid to him in the transactions and it was admitted that the sole consideration for his transfers of property to members of his family was his indebtedness to them respectively.

Alexander White, Jr., was also at the same time indebted to Cotzhausen in a large amount, who sued him in 1881 and obtained four judgments against him aggregating a large amount. Cotzhauzen brought suit against White and his mother, brother, and sisters in the United States circuit court for the northern district of Illinois, alleging that the several transfers and judgment were made and suffered by White when he was insolvent and in contemplation

of insolvency and to hinder and defraud him, Cotzhausen. The lower court sustained this view and held that the whole transactions were void and to operate as a general assignment for the equal benefit of all White's creditors, under section 13 of the statutes of that State. Upon appeal the judgment of the lower court was sustained upon the principle announced, but reversed on a matter of accounting between the parties. The only difference between that case and this was that there was no general deed of assignment there as in the case at bar, but the court, in its opinion, comments upon this fact and holds that in principle the cases are the same.

In the case of Preston *vs.* Spaulding, 120 Illinois, construing the same statute, and which case is cited and approved by the Supreme Court of the United States in its opinion, there was a deed of general assignment for the benefit of creditors generally.
71 The assignee in that case refused to attack the preference, and a creditor then brought suit in equity upon the theory that the giving of the preferences and making of the deed of assignment were parts of one transaction, and consequently that the preferences attempted were illegal and void under the statute, which view was sustained by the Supreme Court; but of this decision we have more to say further on. Returning to the case under consideration, Judge Harlan, after quoting section 13 of the Illinois statute, which reads as follows: "Every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof," says the difficulty with the courts has not been in recognizing the beneficent objects of this legislation, but in determining whether in view of the special circumstances attending their execution particular instruments are to be treated as part of an assignment within the meaning of the statute. The leading case upon this subject in the supreme court of Illinois is Preston *vs.* Spaulding, 1887, Illinois, 208. In that case the members of an insolvent firm in anticipation of bankruptcy made, within a period of less than thirty days, four conveyances of their individual estate to near relatives and various payments of money to other relations on alleged debts. After these conveyances and payments and with full knowledge of impending failure the members of the firm held a conference with their
72 legal advisers, before the expiration of said thirty days, respecting the measures to be adopted by them and the shape their failure was to assume. It was determined that they should make a voluntary assignment, but that preferences be given to certain creditors by executing to them what are called "judgment notes." The assignment in form was made, but on the same day, and before it was executed, the creditors to whom the notes were given caused judgment by confession to be entered thereon, and immediately and before the deed of assignment was or could be filed caused execution to be issued, whereby they took to themselves the great bulk of the debtor's estate. The trustee named in the assignment having refused to attack the preferences thus secured,

a creditor brought suit in equity, upon the theory that the giving of the "judgment note" and the making of the deed of assignment were parts of one transaction, and, consequently, the preferences attempted were illegal and void.

The justice, after citing and quoting a certain passage of the opinion of the supreme court of Illinois, proceeds:

"We agree with the supreme court of Illinois that the statute, being remedial in its character, must be liberally construed—that is, construed largely and efficially, so as to suppress the mischief and advance the remedy.

If, then, we avoid ever-strict construction and regard substance rather than form, if effect be given to this legislation as against mere devices that will defeat the object of its enactment, the several writings executed by Alexander White, Jr., all about the
73 same time, to his mother, sisters, and brother, "whereby in contemplation of his bankruptcy and according to a plan previously formed he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction and operating as an assignment or transfer under which the appellee Cothausen may claim equality of right with the creditors so preferred.

"It is true that there was not here, as in Preston *vs.* Spaulding, a formal deed of assignment by the debtor under the statute, but of what avail will the statute be in securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment and permitting them, under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors."

The court further discusses this question, and arrives at the "conclusion that there is no difference in principle between the two cases."

In Preston *vs.* Spaulding the assignee might have maintained the action if he had seen fit to do so, but as he refused to act the creditor could sue in his stead for the benefit of all the creditors. In the White case, as there was no assignee, "the creditor had to bring suit."

74 "The assignee under the deed of assignment can maintain the action because the preferences are void under the statute, and he may attack a void transaction."

Proceeding with the opinion, the court further said: "We would not be understood as contravening the general principle, so distinctly announced by the supreme court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property to payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor. Such transactions often take place in the ordinary course of business

when the debtor has no purpose in the near future of discontinuing business or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses in order to avoid a general assignment for the benefit of his creditors.

"We only mean by what has been said that when an insolvent debtor recognizes the fact that he can no longer go — in business and determines to yield the dominion of his entire estate, and in execution of that purpose or with an intent to evade the statute transfers all or substantially all his property to a part of his creditors in order to provide for them in preference to other creditors, the instrument or instrument- by which such transfers are made and that result
75 is reached, whatever their form, will be held to operate as an assignment, the benefit of which may be claimed by any creditor not so preferred who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute." While, as we have before remarked, the facts are not entirely similar in the two cases, still the principle we are contending for is fully announced and sustained in the opinion of the supreme court.

The supreme court Pa., in the case of Miners' National Bank *vs.* App., 57 Pa., 193, well states the law applicable to such cases as the one at bar. We quote the following passage of the opinion: "So long as men manage their own affairs and preserve the control of their property, it has been a policy of our laws to suffer them to deal with their estates, in the absence of fraud, as they find most conducive to their interests. This results, in the absence of bankrupt laws, from the freedom of individual action, which the genius of our institutions secures and concedes as a measure of liberty belonging to the citizen and necessary to the development of the greatest good to society.

"It supposes that while the debtor preserves the control of his own affairs in his own hands the vigilance of creditors will be competent to protect their interest and avert any injury. When a man can no longer go on in business and what he has must pass into liquidation of his debts, fairness requires that he should not dictate the course his property shall take. To permit — is to afford
76 an opportunity for the enemies of virtue to obtain preference and to create prejudicial hostility."

We also refer the court to the following cases bearing upon the subject:

Kellog *vs.* Richardson, 19 Fed. Rep., 70.
Kerbs *vs.* Ewing, 22 Fed. Rep., 693.
Freund *vs.* Vaegerman, 26 Fed. Rep., 812.
Hanchett *vs.* Waterbury, 115, 111, 227.
Schroder *vs.* Walsh, 120, 1111, 403.
Berry *vs.* Cutts, 42 Me., 445.
Kellog *vs.* Root, 23 Fed. Rep., 525.
Field *vs.* Geogehan, 125, 111, 70.
Marks *vs.* Burr, 52 Io wa, 518.

In the case of Hanchett *vs.* Waterbury, 115, 111, the court said, in speaking of the Illinois statutes relating to assignments: "They do not prescribe any form of assignment, and it is immaterial how many instruments are used in the attempt to prefer."

Neither is there any form of assignment prescribed by the Ohio statutes for assignments, and the proposition above laid down is peculiarly applicable to the case at bar.

II.

Is the preference to Mathews embraced by section 6343 of the Revised Statutes of Ohio, plead and relied upon by the appellee? That section reads as follows:

"All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trust arising under the same shall be administered in conformity to the provisions of this chapter."

If the argument under the first proposition be sound, it follows as a logical conclusion that the transfer made by Harper in the pass book of the shares of stock and the deed of assignment
77 by Harper must be regarded and held in law as one instrument. The transfer of the shares of stock are a part of and embraced in the deed of assignment, and the shares of stock, together with Harper's other property, passed to Harper's assignee, to be administered by him for the equal benefit of all his creditors.

Is there any escape from this conclusion?

The supreme court of Ohio, we understand, have recently passed upon this question, sustaining the proposition as claimed by counsel for the appellee, but the opinion has never been written for publication as yet. The practice in the supreme court of Ohio is peculiar in some respects. The whole court unite in the framing — the syllabi of the case, showing the points of law decided, and after this some one of the judges write the opinion of the court. It often happens, as in this case, that the syllabi is made public months before the formal opinion is handed down.

But the circuit courts of Ohio, having jurisdiction somewhat similar to the superior court of Kentucky, have decided the point in two cases, and, apprehending that the reports of those courts may not be in the law library of your court, we have taken the liberty to have copies made of the decisions, which we attach hereto for the use of the court.

The case of The Commercial Bank of Ohio *vs.* The Cincinnati National Bank, decided at the January term, 1890, and to be found in 3 Circuit Court Reports, is interesting and, we think, decisive of the question. The syllabus is as follows:
78 "Where an insolvent corporation executes a mortgage upon its property to a creditor and an assignment to a trustee for the benefit of creditors, both instruments being in contemplation of the directors at the same time, they will be regarded as

one instrument, operating as an assignment for the equal benefit of all creditors of the corporation."

The circuit court places its decision directly upon the construction of section 6343 of the Revised Statutes of Ohio, and set out the section in full in its opinion. In passing the court says: "In the case before us the trust is expressly created by the assignment. If it in form contained provisions for the preference which the debtor sought to create by the contemporaneously executed chattel mortgage the transaction would be within the express terms of the statute and, beyond all contention, the preference would fall.

The precise question, therefore, is whether an insolvent debtor may by two or more instruments, executed to different parties in pursuance of a single purpose, *to* assign his property to a trustee with a valid preference, notwithstanding the statute providing that this cannot be done by a single instrument. From principle and the authority of well-considered cases in other States, we conclude that when a debtor recognizes his insolvency and forms a purpose to assign his property to a trustee in order that it may be devoted to the payment of his debts, all instruments that he may execute with that purpose in view are in law one instrument.

* * * "From a *a* large number of cases in which this doc-
79 trine is held these are selected because they utterly refute the theory that *it* rest on statutory provisions not found in this State. They give effect to statutes like ours forbidding assignments with preferences. There being preference in the assignment, the effect of the statute may be, as in Iowa and Illinois and Colorado, to avoid the preference; but in each of these cases the question was whether a mortgage or confessed judgment and assignment related to each other in their inception as are those before us constituted an assignment with a preference."

The affirmative answer to that question was in no case aided by any provision of the statute.

The reason for the conclusion is well stated in Preston *vs.* Spaulding, and our statute retracts nothing from its force. The voluntary assignment is, in its character, remedial, and it must therefore be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment and any other shift or artifice under the forms of law. It is to be observed that this case recognizes the dominion of an insolvent debtor over his property and his right to devote it to paying and securing his creditors as fully as that right has ever been recognized by any authoritative decisions in this State.

But that right ceases when the debtor resolves upon making a general assignment.

"In all of its aspects the case shows a deliberate purpose
80 to commit a fraud upon the statute. Looking beyond the shifts employed to the substance of things done, there appears an assignment to a trustee made in contemplation of insolvency and with intent to prefer a creditor. The statute declares the

result to be that the assignment inures to the equal benefit of all the creditors."

The syllabus of the other case decided on the second circuit is as follows:

"Where it appears that the execution of the deed of assignment and of the preferential chattel mortages was made at one time and in furtherance of a general purpose to make a general assignment for the benefit of creditors under the statute, held that the preferential mortgages and the deed of assignment are parts of the same transaction, and under section 6343, Rev. Statutes, all inure to the equal benefit of all the creditors.

Held, further, that the fact that the chattel mortgages were written upon a separate piece of paper from the deed of assignment can give them no force."

The closing words of the opinion are as follows:

"The execution of the mortgages and the deed of assignment being parts of one single transaction and one purpose, it renders void all preferences not only by the words, but by the very spirit of the statute."

These words are the key-notes to the whole situation.

The preferences are void, and, being void, the assignee is not affected by them. It may be argued these were cases where
81 creditors were attacking preferences. That is true. But in all such cases it is the right and duty of the assignee to attack the preferences, and he is liable for a breach of his bond if he fails to do so.

A transaction void as to creditors is void as to the assignee under this statute, and if an assignee fails or refuses to contest such claims, but recognizes them as valid and pays them, his accounts may be att-cked in his settlements, and all such payments made by him will be disallowed by the court. This has been expressly decided by the supreme court of Ohio in the case of Blangy *vs.* Benedict, 42 Ohio State Reports, 295, where it was said:

"A mortgage void as to creditors is void as against an assignee for the benefit of creditors."

This case holds that even though a mortgage is valid as to the assignor, if it is void as against creditors it is void as against an assignee for the benefit of creditors.

On page 299 the court says:

Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors; by the assignment the rights of creditors passed to the assignee as matter of law. The possession of the assignee was the possession of the creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound in law to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment the assignee is bound to secure for their benefit after the assignment.

82 Liens invalid as against creditors at the time of the assignment remain invalid.

So it will be perceived that under the Ohio law the assignee not

only can but must assert his claim to the property. The assignment laws of the State of Ohio are well adapted to meet the requirements of all classes of cases. Where the preference is given after the debtor has determined to make a general assignment for the benefit of all his creditors and in contemplation of his insolvency it is void as against creditors and the assignee, and he is the proper party to make the contest and assert the rights of creditors under section 6343 of the Revised Statutes, but if the preference is given in the ordinary course of business and without any present intention to make an assignment for the benefit of creditors the creditors must make the contest under section 6344.

The appellee plead section 6343 of the Ohio Statutes and the legal effect of the transaction between Mathews and Harper. There was no denial of the correctness of the statute as set out or of the construction of the fact of the said transactions under the statute, and for that reason counsel for appellee did not argue this point at any length in their former brief.

III.

Upon this proposition we shall content ourselves with the mere citation of a few of the leading authorities bearing upon the subject.

Wharton Con. Laws, secs. 369, 371.
83 Green *vs.* Van Buskirk, 5 Wall., 307.
Ockerman *vs.* Cross, 54 N. Y., 29.
Bagby *vs.* R. R. Co., 86 Penna. St., 291.

IV.

Harper and Mathews were both residents when and where the transaction between them relating to the transfer (of the shares) in the building association took place.

The appellee has set up the deed of assignment to him in Ohio, the attempted transfer from Harper to Mathews, the facts and circumstances under which it was made, the laws of Ohio governing and controlling the same, and asserts his right to the shares in the association.

He is, in our opinion, entitled to have his rights determined by the laws of Ohio and to have the same force and effect given to the deed of assignment and the statutes of Ohio as plead by him as would be given to them as if the case was in an Ohio court. He has set out the Ohio statutes and his claim under it as he believes it to exist, and any denial of rights as aforestated raises a Federal question.

The refusal of the State court in which the suit may be brought to give to the proceedings of the court under which the property was sold the same effect in their operation upon the title as they have by law and usage in the State where they took place constitutes a proper case for review in this under the twenty-fifth section of the judiciary act.

Green *vs.* Van Buskirk, 5 Wallace, 307.

On appeal to the Supreme Court, where a question as to its jurisdiction to review the decision of the New York court
84 was raised, held:

"That the New York court necessarily decided what effect the insolvency proceedings in Massachusetts had by the law and usage in that State, and that as it decided against the effect which the defendant set up for them this court has jurisdiction to review the judgment of the New York court.

Crapo *vs.* Kelly, 16 Wallace, 610.

See also Cole *vs.* Cunningham, decided by the Supreme Court of the United States Jan'y 20, 1890, reported in vol. No. 41, page 205, of the Albany Law Journal.

In presenting this latter question to the court counsel desire to say that they do so with no feelings but those of profound regard and respect for the court. Harper's creditors are numerous and exacting. Their dividends will be but a mere pittance on the amount of their claims even under the most successful and careful administration of the affairs of the estate. Harper's failure was a great one in one respect, and that is as observed when comparing the enormous amount of his liabilities with the little handful of his assets. Therefore we have presented the point with such cases as we have been able to find bearing upon the question.

V.

It will be observed by the court that the appellant did not bring the whole of the record to this court, and under the decisions of this court we think the judgment should be affirmed.

Terrell *vs.* Vowland, 9 Ky. Law Rep., 261; 10 Ky. Law. Rep., 660.

85 We respectfully ask that the former opinion of this court in this case may be withdrawn and the cause affirmed.

HARLAN P. LLOYD,
C. L. RAISON, JR.,
*Counsel for Appellee.*

*Authorities Cited.*

White *vs.* Cotzhausen, Am. Law Reg., vol. 28, No. 6, page 359.
Preston *vs.* Spaulding, 120 Ill., 208.
Miners' National Bank App., 57 Penn., 193.
Kelleg *vs.* Richardson, 19 Fed. Rep., 70.
Kerbs *vs.* Ewing, 22 Fed. Rep., 693.
Freund *vs.* Waterbury, 26 Fed. Rep., 812.
Hanchett *vs.* Waterbury, 115 Ill., 227.
Schroeder *vs.* Walsh, 120 Ill., 403.
Berry *vs.* Cutts, 23 Fed. Rep., 42 Me., 445.
Kellog *vs.* Roots, 23 Fed. Rep., 525.
Field *vs.* Geoghan, 125 Ill., 70.
Marks *vs.* Burr, 52 Iowa, 518.

Section 63, 43 Rev. Stat. Ohio.
Commercial Bank *vs.* National Bank, 3 Circuit Court.
Blangy *vs.* Benedict, 42 Ohio St., 295.
Whar. Con. Law, secs. 369, 371.
Green *vs.* Van Buskirk, 5 Wall., 307.
Ockerman *vs.* Cross, 54 N. Y., 29.
Bagby *vs.* R. R. Co., Penna. St., 291.
Crapo *vs.* Kelly, 16 Wall., 610.
Corle *vs.* Cunninghan, Albany Law Journal.
Terrell *vs.* Howland, 9 Ky. Law, 261; 10 Ky. Law Rep., 660.

(Second Circuit, Franklin Co., O., Circuit Court, January Term, 1889.

Before Judges Stewart, Shauck, and Shearer.

COMMERCIAL NATIONAL BANK OF COLUMBUS, OHIO, *et al.*
*vs.*
THE CINCINNATI NATIONAL BANK.

Where an insolvent corporation executes a mortgage upon its property to a creditor and an assignment to a trustee for the benefit of creditors, both instruments being in contemplation of the
86 directors at the same time, they will be regarded as one instrument, operating as an assingment for the equal benefit of all creditors of the corporation.

Error to the court of common pleas of Franklin county.

On the 3rd of September, 1884, the Columbus Boot and Shoe Company, a corporation, was hopelessly insolvent. On that day its directors met at its office, in Columbus, pursuant to a call of more than two members of the board, and, by minute, authorized its president *pro tem.* to execute a chattle mortgage upon all of its assetts to the Cincinnati National bank to secure its notes executed to the Hugh McKenzie Manufacturing Company of Cinninnati and by it endorsed to the bank, amounting to $31,580.89, to execute a mortgage upon the same property to the Commercial National Bank of Columbus to secure the company's indebtedness of $10,000.00 to it, subject to the mortgage of the Cincinnati bank, and to execute a general assignment for the benefit of creditors, subject to the chattel mortgages. The action was taken by three directors, one of whom was also president of the Cincinnati National bank, another was president of the Hugh McKenzie Manufacturing Co., and all were residents of Cincinnati. A general assignment with the preferences indicated had been resolved upon before leaving Cincinnati, on the previous day, and they brought with them a person who had agreed to qualify and act as assignee. Their attorney also accompanied them, having prepared some, if not all, of the papers before leaving Cincinnati. The mortgages and the deed were contemporaneously signed by the president *pro tem.* Vol. III, 42 #.

87 On the 3rd day of September the mortgage to the Cincinnati National bank was filed with the recorder at 11 a. m., the mortgage to the Commercial National bank at 2 p. m., and the assignment in the office of the probate judge at 2.30 p. m. of the same day. The mortgage to the Cincinnati National bank exceeds the amount realized from the assetts of the Columbus Boot and Shoe Company. The validity of that mortgage was contested on behalf of general creditors and an appeal was taken from the probate court to the court of common pleas; where it was adjudged to be a valid lien upon the assetts prior to all others. To reverse the judgment is the object of this proceeding.

SHAUCK, *J:*

It is not doubted that an insolvent debtor may, in an instrument assigning his property for the benefit of his creditors, make valid provisions for the preference of some of his creditors unless it is prohibited by statute.

Stevenson *et al. vs.* Agry *et al.*, 7 Ohio, pt. 2, 247.

In most of the States such preferences are prohibited by statute. The prohibition in this State is found in section 6343 of the Revised Statutes: "All assignments in trust to a trustee or trustees made in contemplation of insolvency with the intent to prefer one or more creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

88 It is assignments to trustees, with intent to prefer one or more creditors, that this statute converts into an assignment for the benefit of all creditors. It does not destroy an insolvent debtor's dominion over his property or disable him to use it in paying or securing some of his creditors, even though the result may be to wholly defeat others. Harkrader *et al. vs.* Lieby *et al.*, 4 Ohio St., 602. This case and other authorities in this State consistent with it clearly establish the validity of the mortgage in controversy, unless its execution is so related to that of the assignment as to require us to regard it as in substance a part of the same transaction. While the supreme court of the State has determined many cases involving the validity of mortgages executed by insolvent debtors, this question has not been presented to that tribunal. In all of those cases the right of the insolvent debtor to secure a creditor by a mortgage executed for that purpose alone is recognized, and in most of them the determining question is whether the instrument creates a trust in favor of other creditors. In the case before us the trust is expressly created by the assignment. If it in form contained provisions for the preference which the debtor sought to create by the contemporaneously executed chattel mortgage, the transaction would be within the express terms of the statute, and beyond all contention the preference would fail. The precise question, therefore, is whether an insolvent debtor may, by two or more

instruments executed to different parties in pursuance of a
89 single purpose, assign his property to a trustee, with a valid preference, notwithstanding the statute providing that this cannot be done by a single instrument. From principle and the authority of well-considered cases in other States, we conclude that when a debtor recognized his insolvency and forms a purpose to assign his property to a trustee in order that it may be devoted to the payment of his debts, all instruments that he may execute with that purpose in view are in law one instrument.

Parry *et al. vs.* Holden, 22 Pick., 269.
Berry *vs.* Cutts, 42 Me., 445.
Rundlett *vs.* Dole *et al.*, 10 N. H., 458.
Preston *et al. vs.* Spaulding *et al.*, 120 Ill., 208.
Burrows *et al. vs.* Lehndorf, 8 Iowa, 96.
Van Patten *et al. vs.* Burr *et al.*, 52 Iowa, 518.
Hahn *vs.* Salmon *et al.*, 20 Fed. R., 801.
The Dogget, *ect.*, Co. *vs.* Herman *et al.*, 5 McCrary, 269.

From a large number of cases in which this doctrine is held these are selected because they utterly refute the theory that it rests on statutory provisions not found in this State. They give effect to statutes which, like ours, forbid assignments with preferences. There being a preference in the assignment, the effect of the statute may be, as in Iowa and Massachusetts, to render the assignment void; or, as in Ohio, Illinois, and Colorado, to avoid the preference. But in each of these cases the question was whether a mortgage or confessed judgment and an assignment related to each other in their inceptions as are those before us constituted an assignment with a preference. The affirmative answer to that question was in no case aided by any provision of the statute. The reason for the conclusion is well stated in Preston *vs.* Spaulding *et al.*, and our
90 statute detracts nothing from its force: "The voluntary assignment act is, in its character, remedial, and it must, therefore, be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment and any other shift or artifice under the forms of law." It is to be observed that this case recognizes the dominion of an insolvent debtor over his property and his right to devote it to paying and securing his creditors, as fully as that right has ever been recognized by any authoritative decision in this State.

But that right ceases when the debtor resolves upon making a general assignment.

It is suggested that the interests of the general creditors are no more seriously affected in this case than they would have been if the assignment had been made at a later day.

The suggestion evades the point. The validity of a mortgage thus related to an assignment is not to be determined as a question of dates, but as a question of intention. The contemporaneous execution of the two instruments of itself shows that the mortgage was executed with intent to defeat the statute. It is not otherwise important.

Nor does this mortgage derive favor from the consideration that it would have been valid if the assignment had not been made, and that its probable effect would have been to defeat the general creditors in the collection of their claims. That consideration might with propriety be urged upon a legislature as showing that
91 our present statutes are inadequate to the prevention of all forms of commercial injustice, but it ought not to deter a court from giving full force and effect to such remedial statutes as have been enacted to that end. Some of the peculiar features of this case serve only to illustrate the wisdom of the statute and the propriety of enforcing it according to the recognized principles stated; but one of them had legal significance. The president *pro tem.* of the insolvent corporation has no authority by virtue of that statute to execute either the mortgage or assignment. For those purposes it was indispensable that authority should be specially conferred by the directors. The minute shows that his authority to make the assignment was upon the express condition that it should be subject to chattel mortgages which had not then been executed. In this necessary act of authorization there was provision for a preference in the assignment. In all of its aspects the case shows a deliberate purpose to commit a fraud upon the statute. Looking beyond the shifts employed to the substance of the things done, there appears an assignment to a trustee made in contemplation of insolvency and with intent to prefer a creditor. The statute declares the result to be that the assignment inures to the equal benefit of all creditors.

Judgment reversed.

Watson & Burr & Albery & Albery, for general creditors.

Albery & Albery, for Commercial National bank.

M. B. Hagans & W. H. English, for the Cincinnati National bank.

Fifth Circuit, Scioto, O., Circuit Court, Mar. Term, 1889.

92 Before Judges Clark, Cherrington, & Russell.

JOSEPH S. TURNER
*vs.*
FRANK L. REED *et al.*

Where it appears that the execution of the deed of assignment and of the preferential chattel mortgage was made at one time and in furtherance of a general purpose to make a general assignment for the benefit of creditors under the statute, held that the preferential mortgages and the deed of assignment are parts of the same transaction, and under sec. 6343 Rev. Stats. all inure to the equal benefit of all the creditors.

Held, further, that the fact that the chattel mortgages were written upon a separate piece of paper from the deed of assignment can give them no force.

*Statement.*

The defendant Frank L. Reed, a merchant, being insolvent, was sued by the plaintiff, one of his creditors, before a justice of the

peace. While suit was pending, on Saturday evening he called upon his attorney and executed three chattel mortgages and a deed of assignment. On the same evening he delivered the several mortgages to several mortgagees, had them sworn to, and on that evening at a late hour, and at an early hour on the Monday morning following, filed the mortgages, a few minutes intervening, so as to give preference, and then filed the deed of assignment. The court held that Frank L. Reed was insolvent, and, contemplating the making of a general assignment of all his property, executed the chattel mortgages; that the giving of the mortgages and the
93 execution of the deed of assignment were made in contemplation of insolvency; that the chattel mortgages and the deed of assignment covered substantially the same property, and its value was not sufficient to discharge the claim of the first mortgagee, and that the preferential mortgages and the deed of assignment were parts of the same transaction and were within the operation of sec. 6343 of the Rev. Stats. of Ohio, and therefore inure to the equal benefit of all his creditors. The pleadings and the evidence show that the execution of the deed of assignment and the chattel mortgages were made at one time and in furtherance of a general purpose to make assignment and at the same time prefer a part of his creditors.

This the law in plain terms inhibits by the section referred to, and the law cannot be defeated or abrogated by these indirect methods. The court will look at the intention of the party at the time he executes his deed of assignment and the preferential mortgages. The fact that the chattel mortgages were written upon different pieces of paper and the preferences were not included in the deed of assignment can give to them no force if all the instruments "were made in contemplation of insolvency with intent to prefer one or more creditors."

In this case it was an admitted fact that Reed had concluded to surrender all his property which would have been subject to levy of execution upon the very day the deed of assignment was filed, and, having so determined to yield up his property, he engaged counsel, and had prepared at one time the four instruments referred to. The execution of the mortgages and the deed of assignment being parts of one single transaction and one purpose, it renders void all
94 preferences, not only by words but the very spirit of the statutes.

A. T. Holcomb, for plaintiff in error; Duncan Livingstone, for defendants in error.

Afterwards, at a court held on the 22nd day of April, said petition for rehearing was noted of record as filed as follows, to wit:

*Petition for Rehearing Noted of Record as Filed.*

Came appellee, by counsel, and filed a petition and moved the court to grant a rehearing herein, which motion is submitted.

*Opinion Extended on its Face & Petition for Rehearing Overruled.*

Afterwards, at a court held on the 26th day of April, 1890, the court being sufficiently advised, the opinion is extended on its face and the petition for rehearing is overruled.

*Extended Opinion.*

June 21s-, 1887, E. L. Harper made an assignment for the benefit of his creditors.

A few hours before doing so he directed the brother of the appellant, Hattie A. Mathews, to get John Otten to go to an office of the Fidelity Loan Company and get from him his (Harper's) "pass book," evidencing his ownership of twenty shares of stock in the company, then worth from four to five thousand dollars, and draw the value of it by a withdrawal from the company and pay it over to the appellant, Hattie A. Matthews. Otten got the pass book, but found he could not draw the money without an assignment of the stock from Harper. He was selected to do so because it was supposed that his relations with the company would enable him to readily get the money. Not succeeding, he took the pass book to the brother, who filled up an assignment of the stock upon a leaf of it in Otten's name and procured Harper to sign it. It was then delivered to her brother for the appellant, Hattie A. Mat-
95 thews. He then gave it to Otten in order that he might draw the value of it from the company and pay it to her. The company declined, however, to comply with the request, as when it was made Harper had made the assignment for the benefit of his creditors.

The transfer of the stock did not show that it was for the benefit of Hattie A. Matthews, but this was the understanding at the time of all the parties, as is indisputably shown by the evidence.

It, aside from that of the appellant, Hattie A. Mathews, and Harper's, whose testimony was objected to because he was in the penitentiary and one of them was his wife, also shows that at the time of the transfer he was indebted to the appellant, Mathews, in a sum greater than the value of the stock, and that it was made by way of part payment.

It is therefore unnecessary to determine the competency of the appellant and Harper's wife as witnesses, or whether any portion of their testimony is competent. It appears that the appellant received from her father's estate in 1880 about one thousand dollars. She then resided with Harper, who was her brother-in-law, and continued to do so up to the time of his failure, and perhaps longer. She turned the money over to him for investment. He was then a wealthy man and continued to be so regarded until shortly before his failure. He was utterly wrecked financially and became an inmate of a prison through reckless speculation, which, *ignis fatuus* like, led him on even to the commission of crime. The investment

for her by him resulted in great gain in a short time, and, in
96 settlement of what was coming to her through it, he on August 8th, 1881, executed to her his note for five thousand dollars, no part of which had been paid at the time of his failure, save the interest to January 1st, 1882.

June 24th, 1887, certain of his creditors served out attachments in the Campbell chancery court and attached the interest in the loan company that had been transferred to the appellant, but in the name of Otten for the purpose of collection for her. September 16th, 1887, she, by answer and cross-petition against the trustee of Harper under the deed of assignment, became a party to the consolidated suits of these creditors. She claimed the stock, her pleadings setting forth the grounds of her claim, and Otten joining with her in it.

January 4th, 1888, the trustee, in answer to her cross-action, set up a claim to the stock under the deed of assignment. The creditors are not parties to the appeal, nor are their pleadings made a part of the record before us.

In the consideration of the matters involved we will waive the question of the right of the trustee to assert in a suit a claim to the stock when the assignor in the voluntary assignment could not do so.

The evidence fails to show that the appellant's deed was a fraudulent one, nor is a state of circumstances shown from which we are authorized to presume it. This is also true as to her claim to the stock in the loan company based upon the transfer in Otten's name.

No fraudulent purpose is shown even by inference. It was,
97 however, undoubtedly intended as a preference of the appellant as a creditor by Harper as a debtor. Indeed, this is expressly admitted by her pleadings.

The parties all resided in Ohio, and the entire transaction occurred there. Its validity is, therefore, to be tested by the law in force there. The deed of trust was also made there. At common law a debtor had a right to prefer a creditor, either by a payment or an express preference in a deed of assignment. He has a right to pay his debt, and it is only by virtue of statutory law that such a payment can be held invalid and the creditor be compelled to surrender his advantage.

In the absence of any showing of the existence of such a statute in another State it must be presumed that the common law is in force there.

Honore *v.* Hutchins, 8 Bush, 687.
Miles *vi.* Collins, 1 Met., 308.

The appellee has in his pleadings set out a section of an Ohio statute, which reads thus: "All assignments in trust to a trustee or trustees made in contemplation of insolvency with intent to prefer one or more creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity to the provisions of this chapter;" and which, he claims, invalidates

a preference like this one. We are unable to judge of it by its title and its other sections, as the entire statute is not before us.

It does not appear to us, however, to embrace a case like this one, but to relate alone to preferences made in deeds of assignments to trustees for creditors generally.

Certainly no such trust was created in the transfer of
98 the stock as this statute contemplates. None was intended. Otten was not named as trustee for the appellant. He was but an agent to draw the value of the stock for her, and then at once to pay it over to her.

The preference was a *bona fide* one. It was made by the assignment and delivery of the written evidence of the ownership of the stock. The preponderance of the testimony shows that the transfer was made in the morning and the assignment not until the evening of the same day. In any event they were not made or even prepared at the same time. It was not one transaction, and the written transfer of the stock and the assignment cannot, upon the evidence, be regarded as really constituting but one instrument. If they could be, then the transfer of the stock would perhaps fall within the interdiction of the statute as being in fact a part of the deed of assignment.

The rules of the common law govern the transaction, and when so considered it is not invalid, because a payment of a pre-existing debt in view of coming insolvency is not forbidden by them.

It is urged that such a preference is contrary to the statute of this State, and will not therefore be upheld by its courts. It is true comity does not require one State to violate its own laws to enforce those of another. Such a preference is not fraudulent or void, however, under our statute. Upon the contrary, it operates as an assignment not only of the particular property embraced by the preference, but of all the debtor owns for the payment of his debts
99 *pro rata*, provided advantage be taken of it in the manner and within the time prescribed by the statute. It merely inures to the benefit of all the creditors if they or any of them so ask in proper time and manner. It is a privilege given them.

If an assignment made in another State and valid there be contrary to the law or the settled policy of this State, it will not be enforced here to the prejudice of our own citizen creditors.

It does not appear, however, that any citizen of this State will be prejudiced by the preference in question. The appellant may certainly come into court and assert her claim. She may sue. Her adversary is a non-resident. It does not appear that any of the creditors are residents. If any presumption is to be indulged it is that they are residents of Ohio, where this transaction occurred, because the deed of assignment was made there and the trustee resides there. No citizen of this State is questioning her right.

Under this state of case the appellant, inasmuch as the preference was valid when made, should not, in our opinion, be turned out of court.

The appellee is not in a position to deny the right of the appellant to relief because Harper was not before the court upon the cross-

pleadings. She is claiming to be the owner of the stock and did become at least the equitable owner by the transfer to Otten, the legal title being in him.

The appellee claims it under the deed of assignment to him. In any event Harper is not the owner, and he was not, therefore, a necessary party to the contest over the ownership between
100 these two claimants. He had parted with the right to it to one or the other of them beyond all question.

It is urged *that* the second paragraph of the answer and reply of the trustee, in which it is averred in affirmative form, that at the time the transfer was made Harper was contemplating an assignment and that it was therefore fraudulent, and so in fact is undenied and that it must therefore be so held. Its averments must, however, be regarded as statements negotiating those of the cross-petition of the appellant. It is therein averred that the transfer was *bona fide* and upon sufficient consideration, and these averments of the answer and reply of the appellee are in substance but contradictory of them, although couched in affirmative language.

The transfer was in fact made. It was not fraudulent, nor as a preference was it forbidden by the *lex loci* and it must be upheld.

The judgment is reversed with directions to render one for the appellant in conformity to this opinion.

101 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Hattie A. Matthews and J. H. Otten, plaintiffs, and H. P. Lloyd, assignee of E. L. Harper, and The Fidelity Building Association, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
102 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said H. P. Lloyd, assignee of E. L. Harper, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twentieth day of November, in the year of our Lord one thousand eight hundred and ninety.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—
DAVID J. BREWER,
*Associate Justice Sup. C't U. S.*

103 Service of a true copy of the within writ of error is hereby acknowledged and accepted by me for the court of appeals and the judges thereof this the 2nd day of December, 1890.

WM. H. HOLT,
*Chief Justice of Kentucky Court of Appeals.*

104 COMMONWEALTH OF KENTUCKY:

I, W. W. Longmoor, clerk of the Kentucky court of appeals, hereby certify that the preceding one hundred pages contain a true, full, and complete transcript of the record and proceedings had in said court of appeals on the appeal of Hattie A. Mathews & J. H. Otten, appellants, against H. P. Lloyd, assignee of E. L. Harper, and The Fidelity Building Association, appellees, as appears of record and on file in my office. This record is made and transmitted to the Supreme Court of the United States in obedience to the writ of error from said Supreme Court to the court of appeals of Kentucky in the cause aforesaid, a true copy of which said writ of error is duly filed and on record in my office; and the said original writ, service of which is duly accepted by Wm. H. Holt, chief justice of the court of appeals of Kentucky, and whose genuine signature was attached thereto in my presence, is herewith returned with this record.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the official seal of my said office.

Done at Frankfort, Kentucky, December 2nd, A. D. 1890.

W. W. LONGMOOR,
*Clerk Kentucky Court of Appeals.*

105 Know all men by these presents that we, Harlan P. Lloyd, trustee of the estate of E. L. Harper, as principal, and William S. Walker and William T. Perkins, as sureties, are held and

firmly bound unto —— —— in the full and just sum of two hundred and fifty dollars, to be paid to the said —— ——, certain attorney, executors. administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of November, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a session of the court of appeals of the State of Kentucky, in a suit depending in said court between Hattie A. Matthews and J. H. Otten against H. P. Lloyd, assignee of E. L. Harper, and The Fidelity Building Association, a decree was rendered against the said H. P. Lloyd, assignee of E. L. Harper, and the said H. P. Lloyd, assignee of E. L. Harper, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Hattie A. Matthews and J. H. Otten, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said H. P. Lloyd, trustee of the estate of E. L. Harper, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HARLAN P. LLOYD, [SEAL.]
*Trustee of E. L. Harper.*
WILLIAM S. WALKER. [SEAL.]
WILLIAM T. PERKINS. [SEAL.]

Sealed and delivered in presence of—
FRANK F. DINSMORE.
WILLIAM N. HOBERT.

Approved by—
B. R. COWEN,
*Clerk U. S. Circuit Court, So. Dist. Ohio.*

Approved.
DAVID J. BREWER, *Justice.*

106 COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *sct:*

I, Woodford W. Longmoor, clerk of the court of appeals of Kentucky, certify that the within is a true copy of the original bond this day filed in my office in the case of Hattie A. Matthews and John Otten against H. P. Lloyd, assignee of E. L. Harper, and The Fidelity Building Association, lately pending in said court of appeals.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office. Done at Frankfort, Kentucky, this 10th day of February, A. D. 1891.

WOODFORD W. LONGMOOR,
*Clerk Kentucky Court of Appeals.*

Fee, $1.50.

[Endorsed:] Sup. Court U. S. 1890, Oct'r term. No. 1602. H. P. Lloyd, assignee, &c., pl'ff in error, *vs.* Hattie A. Matthews *et al.* Certified copy of appeal bond. Office Supreme Court U. S. Filed Feb. 14, 1891. James H. McKenney, clerk.

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hattie A. Matthews and J. H. Otten, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein H. P. Lloyd, assignee of E. L. Harper, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this twentieth day of November, in the year of our Lord one thousand eight hundred and ninety.

DAVID J. BREWER,
*Associate Justice.*

108 On this second day of February, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared C. L. Raison, Jr., before me, the subscriber, William S. Walker, a notary public in and for Hamilton county, State of Ohio, and makes oath that he delivered a true copy of the within citation to John S. Ducker, counsel for the said Hattie A. Mathews and John H. Otten, in the Campbell chancery court and court of appeals of Kentucky, in the case of Mathews, &c., Lloyd, assignee, in which case a writ of error has been granted to the court of appeals of Ky.

C. L. RAISON, JR.

Sworn to and subscribed before me this Febr'y 2nd, A. D. 1891.

[Notarial Seal, Hamilton County, O.]

WM. S. WALKER,
*Notary Public, Hamilton County, Ohio.*

I hereby, as counsel for Hattie A. Mathews and John H. Otten, both in the Campbell chancery court of Kentucky and the court of appeals of Kentucky, in the case of Mathews and Otten, appellants, *vs.* Harlan P. Lloyd, assignee of E. L. Harper, accept and acknowledge for said Mathews and Otten service of a true copy of the within citation.

January 30, 1891.

JNO. S. DUCKER,
*Counsel for Mathews & Otten.*

109 [Endorsed:] Supreme Court U. S. 1890, October term. No. 1602. H. P. Lloyd, assignee, &c., pl'ff in error, *vs.* Hattie A. Matthews. Citation and proof of service. Office Supreme Court U. S. Filed Feb. 4, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,467. Kentucky court of appeals. No. 377. H. P. Lloyd, assignee of E. L. Harper, plaintiff in error, *vs.* Hattie A. Matthews and J. H. Otten. Filed January 29, 1891.

CASE No. 14,467.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

Term No., 1914.

H. P. LLOYD, ASSIGNEE OF E. L. HARPER, PLAINTIFF IN ERROR,

*vs.*

HATTIE A. MATTHEWS AND J. H. OTTEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

RECORD FILED JANUARY 29, 1892.

# CASE No. 14,467.

## EXTRACTS FROM TRANSCRIPT OF RECORD:

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., 1014.

H. P. LLOYD, ASSIGNEE OF E. L. HARPER, PLAINTIFF IN ERROR,

*vs.*

HATTIE A. MATTHEWS AND J. H. OTTEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.


| | Page. |
|---|---|
| Transcript from Campbell chancery court | 1 |
| Order making Matthews and Otten parties | 1 |
| Petition to be made parties | 1 |
| Order filing pleadings, &c. | 2 |
| Note as to exhibit | 2 |
| Amended answer and cross petition of Matthews and Otten | 3 |
| Exhibit C—Note of Harper to Matthews, August 8, 1881 | 4 |
| Reply and answer of Lloyd, trustee | 4 |
| Order on motion to set aside order of January 11, 1888, &c. | 7 |
| Order filing motion, &c. | 7 |
| Motion to strike depositions, &c. | 8 |
| Amended answer, &c., of Lloyd, trustee | 8 |
| Order filing exceptions | 10 |
| Exceptions to depositions | 10 |
| Order submitting exceptions, &c. | 12 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1892.

| | Page. |
|---|---|
| Order filing reply of Matthews | 12 |
| Reply of Matthews | 12 |
| Order submitting motion, &c | 13 |
| Order on exceptions | 13 |
| Order submitting case | 13 |
| Amended answer of Lloyd, trustee | 14 |
| Judgment | 14 |
| Appeal to court of appeals | 15 |
| Hearing in court of appeals | 15 |
| Judgment of court of appeals | 15 |

(Record, pages 2 to 28, incl.)

* * * * * * *

STATE OF KENTUCKY:

Campbell Chancery Court.

Pleas before the Hon. J. W. Menzies, chancellor of the chancery court, at the court-house, in the city of Newport, Ky., on the 7th day of September, 1888.

ALBERT SILVA
*vs.*
FIDELITY NATIONAL BANK, &c. } # 3272. Consolidated Cases. In Equity.

Be it remembered that heretofore, to wit, on the 16th day of September, at the September term (1888) of the Campbell chancery court, the following order was made, to wit:

Came Hattie A. Matthews and J. H. Otten and filed their petition to be made party and they are made party defendants, and their petition is taken as their answer and cross-petition herein.

The petition to be made party, referred to in the foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl'tiff,
*vs.*
FIDELITY NATIONAL BANK, &c., Def'ts. } Petition of Hattie Matthews & J. H. Otten to be Made Parties.

The petitioners, Hattie A. Matthews and J. H. Otten, present this their petition to be parties defendant of the record herein for the following reasons, to wit:

Petitioners say that the defendant E. L. Harper, a short while before he executed the deed of assignment in the pleadings referred to, was the owner of 20 shares of stock in the Fidelity Building, Saving & Loan Company of Newport, Kentucky, of the full value of — dollars, which was evidenced by book of the said company No. 32, which is made an exhibit of this pleading.

Petitioners say further that the said E. L. Harper was a creditor of the petitioner Hattie A. Matthews in a sum equal to the full face value of the said building association stock.

Petitioners say that at the time of the said deed of assignment and theretofore and since the said defendant, E. L. Harper, was a citizen and resident of the State of Ohio, and by the laws in existence at that time in said State of Ohio debtors had the right to make preference in the payment of their creditors either in the deed of assignment or by paying them theretofore in such a way as they saw proper.

Petitioners say that on the day *of* the said deed of assignment

was made and executed in the State of Ohio, to wit, on the 27th day of June, 1887, several hours before the execution of said deed of assignment, the said E. L. Harper, defendant, executed and delivered in writing to the petitioner J. H. Otten all the said 20 shares of stock of said building association, with directions to him, the said J. H. Otten, to collect the proceeds of the said stock and pay the same to the petitioner Hattie A. Matthews.

Petitioners say that by the said transfer of assignment which is recorded in the said book that is made an exhibit to this pleading the petitioner Hattie A. Matthews became and is now the owner of the said stock of the proceeds thereon. Petitioners say further that plaintiffs in the consolidated cases herein, H. M. Healy, A. R. Bloomfield, Peter Schultz, and Albert Silva, in their said suits attached the said building association stock as the property of said defendant, E. L. Harper, and are severally asserting claim thereto in this case.

Petitioners say further H. P. Lloyd, assignee in the State of Ohio of the said E. L. Harper, has also been made a party to the defendant herein and claims the said stock as part of the assignment of the estate of the said E. L. Harper.

Petitioners say said transfer was *bona fide* and for valuable consideration and passed all interest of the said E. L. Harper thereto.

Petitioners now come and ask to be made parties defendant to this suit; that this pleading be taken as their answer and cross-petition; and pray further as against the said several plaintiffs who have attached the said stock, and also pray as against the said H. P. Lloyd, that the said stock in the said building association be adjudged the property of defendant Hattie A. Matthews; for costs and for all proper relief.

R. W. NELSON &
JNO. S. DUCKER,
*Attorneys for Hattie A. Matthews and J. H. Otten.*

CAMPBELL COUNTY, }
*State of Kentucky.* }

Petitioner Hattie A. Matthews says the statements of the foregoing pleadings are true as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD, *Ex. C. C. C.*

Thereafter, at the January term of the court, on the 14th day of January, 1888, the following order was made, to wit:

Came Hattie A. Matthews and filed exhibit to her petition to be made party, and Hattie A. Matthews and J. H. Otten filed joint amended answer and cross-petition, and Lloyd, trustee, filed reply and answer.

The exhibit to petition of Hattie A. Matthews does not appear

among the papers in this case. The joint amended answer and cross-petition referred to in the foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl't'ff,
*vs.*
FIDELITY NATIONAL BANK and CONSOLIDATED CASES, Def'ts.

Hattie A. Matthews and J. H. Otten, who have heretofore been made parties defendant to these consolidated cases, and their petition filed to be made parties having been taken as their answer and cross-petition, now come and amend their said pleading and say that their codefendant E. L. Harper on the 8th day of August, 1881, agreed and promised to pay on demand to the defendant Hattie A. Matthews the sum of $5,000.00, with 8% interest from date until paid, and the interest was to be paid quarterly.

Plaintiff says the said contract was executed in Cincinnati, Ohio, where this defendant and the said E. L. Harper then resided, and by the laws of the said State of Ohio, then in existence, contracts for 8% interest for the use of money were legal, valid, binding, and obligatory.

Plaintiff says on the said note the interest was paid to January 1st, 1882, and on the — day of June, 1887, when the stock of said Fidelity Building, Saving and Loan Company was transferred to the defendant Hattie A. Matthews through the defendant J. H. Otten, there was due something over $7,000.00 on said debt. The defendants file herewith as part of said pleading the said original note hereinbefore described and mark it Exhibit "C."

Plaintiff says that at the time of the transfer of the said building association stock, in June, 1887, to the defendant Hattie A. Matthews, the assignment of which is also made part of this pleading, the said building association stock was worth $4,188.88 or thereabout, and that said Harper owes the defendant Hattie A. Matthews at least $3,000.00 yet on the said indebtedness after crediting said building association stock.

Wherefore the defendants makes this and their former pleading cross-petitions against all the plaintiffs herein and against defendant Lloyd, against defendant building association, and all other defendants, and pray as in their original pleading, the same filed on September 16th, 1887, for costs and for general relief.

JNO. S. DUCKER, *Att'y.*

CAMPBELL COUNTY, }
*State of Kentucky.* }

The defendant Hattie A. Matthews says the statements of the petition to be made party that was filed herein on the 16th day of September, 1887, by her and her codefendant, J. H. Otten, were true and the statements of the above pleading are true, as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD, *Ex. C. C.*

Exhibit "C," referred to in foregoing amended answer, &c., is in words and figures as follows, to wit:

$5,000.00. CINCINNATI, *Aug. 8th*, 1881.

On demand, after date, I promise to pay to the order of Miss Hattie A. Matthews five thousand dollars, value received, with 8% interest from date till paid; interest payable quarterly.

E. L. HARPER.

Endorsed: Interest paid on the within note Jan. 1st, 1882.

(Endorsed in pencil:)

| | |
|---|---|
| "July 14, 1887, note & int. | 7,188 88 |
| 20 shares Build. — Newport | 4,188 88 |
| Bal. due | 3,000 00" |

The reply and answer of Lloyd, trustee, referred to in foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

| | |
|---|---|
| ALBERT SILVA, Plaintiff, *vs.* FIDELITY NATIONAL BANK, &c., Defendants. | Reply to Answer and Answer to Cross-Petition of Otten & Matthews in Consolidated Cases. |

The defendant Harlan P. Lloyd, trustee of E. L. Harper, for reply to the answer and answer to the cross-petition of John Otten and Hattie A. Matthews in the consolidated cases herein, says that he admits that a short time before said E. L. Harper executed his deed of assignment to this defendant he, said Harper, was the owner of twenty shares of stock mentioned in the Fidelity Building, Savings and Loan Company of Newport, Kentucky, but he denies that said E. L. Harper was a creditor or debtor of the said Matthews in a sum equal to the face value of the said stock or in any other sum whatever at the time of the said assignment. He admits that at the time of the execution of his said deed of assignment said Harper was a citizen and resident of the State of Ohio; so was said Matthews. He denies that at the time of making said assignment that debtors had, by the laws of the State of Ohio, the right to prefer their creditors in the deed of assignment. Defendant admits that within a few hours before the execution of the deed of assignment the said Harper attempted, by an endorsement or pretended assignment in the pass book of said Harper evidencing his interest in said association, to transfer to said J. H. Otten the said shares in said association, but denies that he gave directions or any direction to said Otten to collect the proceeds of the said shares or to pay over, when collected, the *the* proceeds of said shares to said Matthews. He de-

nies that there was any consideration whatever to or for the said pretended assignment by said Harper to said Otten, or that by said transfer or assignment the said Matthews became or was or is now the owner of the said shares of stock or the proceeds thereof.

Defendant denies that said transfer of said shares of stock was *bona fide* or for a valuable consideration, or that it passed any interest of said Harper thereto.

2nd. For further defense defendant says that at the time of the assignment of said Harper on the 21st day of June, 1887, the said Harper and Matthews were both residents and citizens of Hamilton county, State of Ohio; that said Harper was hopelessly insolvent and was then contemplating the making of the assignment which he subsequently made, as referred to by this defendant in his answer and cross-petition in the consolidated cases herein, which facts are well known to both said Matthews and said Otten, at the time of the pretended transfer of said shares of stock to said Otten; and this defendant says that the said transfer and conveyance of said shares of stock to said Otten by said Harper was made for the purpose and with the intent to defraud the creditors of said Harper of their just and lawful debts, and defendant says that under and by virtue of the laws of the State of Ohio, Revised Statutes, volume 1, sec. 4196, which said law was then and is now in full force and effect and provides as follows, to wit: "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels and every bond, judgment, or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages or to defraud or deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods, or chattels shall be deemed utterly void and of no effect"—

The said alleged transfer and assignment by said Harper of said shares of stock was fraudulent and void and of no effect, and that the title to and ownership of the said shares of stock passed under the deed of assignment of said Harper to this defendant, who is now the legal owner and holder of the same and entitled to have and receive the proceeds of the same, to be administered by him as the law in such cases in the State of Ohio made and provided directs. The said Harper at the time of said alleged transfer was largely in debt, and numerous claims then existed and now exist against his said estate, on which only a small percentage can be paid from the assets and estate of the said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

3rd. For further defense defendant says that at the time said Harper made said alleged transfer of said share of stock in said association to said Otten he, said Harper, was hopelessly insolvent, and within a few hours thereafter said Harper made the assignment for the benefit of his creditors under which this defendant claims, as set out in his answer and cross-petition herein, to which reference is here made, and said alleged transfer and conveyance to said Otten or said Matthews, as claimed by her, was made without any valuable consideration whatever therefor and was illegal and void and

of no effect as against the then existing creditors of said Harper and against this defendant, the representative of said creditors. Said Harper at said time was largely in debt, and numerous claims then existed and now exist against his said estate, on which only a small percentage can be paid from the assetts and estate of said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

4th. For further defense this defendant says that at the time of the alleged transfer of said stock in said association to said Otten said Harper was hopelessly insolvent and within a few hours thereafter made the deed of general assignment for the benefit of his creditors and under which this defendant claims the said shares of stock, as set out in his answer and cross-petition herein, to which reference is here made. The said transfer of assignment to said Otten or Matthews, as it may be, was made by said Harper with the intent to delay, hinder, and defraud his then existing creditors, the said Otten and Matthews being well aware of the insolvency of said Harper and of the purpose and intent of said Harper in making said alleged transfer when it was made; and defendant says that said transfer and assignment was illegal and void as to the then creditors of said Harper and this defendant, their representative, and passed no title to said shares of stock to said Otten or Matthews, but the same passed to and now belongs to this defendant under the said deed of assignment of said Harper to this defendant, who is now the owner thereof and entitled to have the said stock and its proceeds, as trustee under said deed, to be administered under said trust.

5th. For further defense defendant says that at the time of the alleged transfer and assignment of said shares of stock in said association by said Harper to said Otten or said Mathews, if the same was made for her benefit, as alleged by her in her answer herein, the said Harper was hopelessly insolvent and in contemplation of insolvency and of the making of the deed of general assignment of all his property for the benefit of all his creditors, as subsequently made by him within a few hours of the time of said alleged transfer to said Otten; and if the transfer were made for the benefit of said Mathews, as claimed and alleged by her, it was made by said Harper with the intent to prefer her over his other creditors (if she was a creditor, which defendant denies) and was void under and by virtue of the laws of the State of Ohio, of which State said Harper and said Matthews were then citizens and where they then resided and where said deeds of assignment by said Harper was made, sec. 6343, volume 2, page 1332, Revised Statutes of the Laws of the State of Ohio, which laws were then and are now in full force and effect, and which read as follows, to wit: "All assignments in trust to a trustee or trustees made in contemplation of insolvency with the intent to prefer one or more creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter." The said transfer or assignment inured to the equal benefit of all the

creditors of said Harper to be administered by this defendant under the law in such cases made and provided and under his trust as trustee of said Harper, and this defendant is entitled to have said shares of stock and their proceeds to administer the same under his said trust.

Wherefore, having fully answered the cross-petition and replied to the answer of the defendants Otten and Matthews, he prays as in his original answer and cross-petition, and for all proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

STATE OF OHIO, }
*Hamilton County.* }

Harlan P. Lloyd, trustee of E. L. Harper, being duly sworn, says that he believes that the statements of the foregoing reply and answer are true.

HARLAN P. LLOYD,
*Trustee of Estate of E. L. Harper.*

Subscribed in my presence and sworn to before me this 4th day of January, 1888.

[SEAL.] WM. S. WALKER,
*Notary Public, Hamilton County, Ohio.*

And at the January term of the court, on the 13th day of January, 1888, the following order was made, to wit: Lloyd, trustee, moves to set aside the order of January 11th, 1888, which sets aside the filing of his answer, and Brownell objects. The *the* court overruled the objections, and the order setting aside the filing of Lloyd's answer is set aside, and on motion of Lloyd, trustee, this cause is submitted upon his cross-petition and the whole case, and Brownell excepts; and Otten and Matthews move to strike the answer of Lloyd, trustee, from the files, and Lloyd, trustee, objects, and this cause is submitted on said motion.

And thereafter, at the May term of the court, on the 7th day of May, 1888, the following order was made, to wit:

Lloyd, trustee, filed motion to strike the depositions of Mrs. Harper and Hattie A. Matthews from the files, and plaintiff objects; and Lloyd, trustee, offered an amended answer and set-off and cross-petition against Hattie A. Matthews and John Otten, to the filing of which said Matthews and Otten object.

The motion to strike depositions from the files referred to in foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, &c., Pl'ffs,
*vs.*
FIDELITY NATIONAL BANK, &c., Def'ts.

Motion of Lloyd, trustee, to strike depositions of Mrs. Harper & Miss Matthews from the files.

The defendant and cross-petitioner Harlan P. Lloyd, trustee of E. L. Harper, now comes and moves the court to strike the deposition- of Emma F. Harper and Hattie A. Matthews from the files of this court and to suppress them because—

1st. Mrs. Harper is the wife of the defendant E. L. Harper, of whose estate H. P. Lloyd is trustee, and said Emma F. Harper testified in her said deposition in favor of said Mathews and against said E. L. Harper and his trustee, Lloyd, and is incompetent as a witness in said matter and controversy between said Harper and his trustee, Lloyd, and said Matthews.

2nd. Said E. L. Harper, of whom said Lloyd is trustee,— at the time said depositions were taken and is now confined in the penitentiary in Columbus, State of Ohio, as a prisoner and convict under a sentence of ten years for embezzlement and fraudulent conversion to his own use of the funds and assets of the Fidelity National bank, and said testimony of said Matthews is in favor of herself and against said Harper and his trustee, Lloyd, and said Matthews is an incompetent witness in her own behalf.

C. L. RAISON, JR.,
*Att'y for Lloyd, Trustee.*

The amended answer, set-of-, and cross-petition referred to in the foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, &c., Plaintiffs,
*vs.*
FIDELITY NATIONAL BANK, &c., Defendants.

Amended answer, set-off, and cross-petition of Harlan P. Lloyd, trustee of estate of E. L. Harper, ag'st John Otten & Hattie A. Matthews.

Harlan P. Lloyd, trustee of the individual estate of E. L. Harper, now comes and amends his answer to the cross-petition of Hattie A. Matthews and John Otten herein, and says that he denies that on the day the alleged transfer of the twenty shares of stock in the Fidelity Building and Saving & Loan Company was pretended to have been made by said E. L. Harper to the defendant Otten, to wit, June 21st, 1887, there was due to said Hattie A. Matthews from said E. L. Harper on the note for $5,000.00, set out in the petition and filed therewith, over the sum of $7,000.00, or that there was anything whatever due on said note. There was nothing due from

said Harper to said Matthews at said time on account of said note or otherwise.

He denies that at the time of the alleged transfer — said shares of said building association stock to said Otten it was only worth $4,188.88 or thereabouts. It was worth at said time over $4,900.00. He denies that there is yet $3,000.00 or any other sum due on said note or otherwise from said Harper to said Matthews. This defendant further says that since the filing of his last pleading herein, to wit, January 4th, 1888, he has discovered that E. L. Harper, on the 5th day of January, 1883, sold and transferred to said Hattie A. Matthews 50 shares, of the par value of $100 each share, making the sum of $5,000.00, of the capital stock of the Swifts iron and steele works, which was either delivered to and received by said Matthews in full satisfaction of the claim against said E. L. Harper, if any she had, or the transfer was without any consideration whatever, and this defendant and cross-petitioner cannot state which part is true, but he says that one or the other is true.

He says that said stock at said time was reasonably worth the sum of $100 a share, the par value of said stock, and that if said stock was not transferred by said Harper and received by said Matthews in satisfaction of her claim against said Harper to the extent of the same, then she is in debt to and there is due and owing to this defendant and cross-petitioner, as trustee of said Harper, from the said Mathews the sum of $5,000.00, with interest from the 5th day of January, 1883, which sum in such case is just, due, and unpaid either in whole or in part.

He prays the court that an account may be taken to ascertain what sum, if any, was due from said Harper on the said 5th day of January, 1883, and that if upon such accounting anything be found to have been due from said Harper to said Matthews that the value of said stock, to wit, $5,000.00, may be set off against said claim as of date Jan'y 5th, 1883, and that he may have judgment against her for the unpaid balance on said stock, or that if it should appear upon such accounting that there was nothing due to said Matthews on said date that then he may have judgment against said Mathews for the sum of $5,000.00, with interest from the 5th day of January, 1883, and costs, and he makes the pleading an amended answer, set-off, and cross-petition against said Matthews and Otten, and prays for all general and proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell County.* }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney for Harlan P. Lloyd, trustee of E. L. Harper; that said Lloyd, trustee, is now absent from this county and State, and this affiant says that he believes that the statements of the foregoing amended answer, set-off, and cross-petition are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

JOHN C. SCHROLL, *Clk*,
By A. L. RENSCHER, *D. C.*

And at the same term of the court, on the 9th day of May, 1888, the following order was made, to wit:

Lloyd, trustee, filed exceptions to the depositions of Mrs. Harper, Hattie A. Matthews, John H. Matthews, John N. Otten, and A. P. Gahr.

The exceptions to depositions referred to in foregoing order *is* in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl'ffs,
*vs.*
FIDELITY NATIONAL BANK, &c., Def'ts.

Exceptions of Lloyd, trustee, to depositions of Emma F. Harper, John H. Matthews, John H. Otten, A. P. Gahr, and Hattie A. Matthews.

1. Lloyd, trustee, excepts to the whole deposition- of Emma F. Harper and Hattie A. Matthews, and asks that the same may each be suppressed and held to be incompetent, said witnesses being incompetent to testify in this cause in favor of said Hattie A. Matthews and against E. L. Harper and H. P. Lloyd, trustee of his estate, because—

1. The witness Emma F. Harper is the wife of the defendant E. L. Harper, of whose estate said Lloyd is trustee, and is incompetent as a witness in this cause in favor of said Hattie A. Matthews in the matter of the controversey between said Hattie A. Matthews and said E. L. Harper and Lloyd, his trustee, &c., in these consolidated cases.

2nd. To the depositions of Hattie A. Matthews: Said Matthews is incompetent as a witness in this case in her own favor in the controversy between herself and E. L. Harper and Lloyd, his trustee, as to the ownership of the 20 shares of stock in the Fidelity Loan, Building & Saving Association because E. L. Harper, of whom she claims to have received said stock by transfer through Otten in *in* trust for her, is a prisoner confined in the State penitentiary o the State of Ohio, at Columbus, under a ten-year sentence for embezzling and converting to his own use the funds and property of the Fidelity National bank. Said Harper made an assignment for benefit of creditors, and said Lloyd is the trustee under said assignment.

3. Exceptions to Hattie A. Matthews' deposition: He excepts to question and answer No. 2 because said Matthews is incompetent to — the facts, and especially as to the amount owed her by E. L. Harper August 8th, 1881.

4th. He excepts to question and answer 6 of the direct examination of the witness because same is incompetent and irrelevant and

purports to *to* give statements of E. L. Harper about which he is disqualified from and incompetent as a witness to testify.

5th. To question and answer 8 in direct examination of the witness because incompetent and irrelevant.

6. He excepts to question and answer 9 in re-examination of the witness because incompetent and irrelevant.

7th. He excepts to question and answer 10 in same examination for same reason.

8. He excepts to question 11 in same examination because it is leading, and also incompetent, for reasons that Harper cannot testify.

Lloyd, trustee, excepts to the following questions and answers of the depositions of Emma F. Harper:

1st. He excepts to so much of the answer to question 4 in the direct examination of the witness as attempts to state that Miss Matthews gave money to E. L. Harper, what Harper did with it, and what Harper told her about the matter because the same is incompetent and irrelevant.

2nd. He excepts to question 5 and answer thereto because incompetent and irrelevant.

3. To question 6 and answer thereto for same reason.

4. He excepts to question 7 and answer thereto because incompetent and irrelevant and not competent against Harper or Lloyd, trustee.

5. To question 9 thereto and answer for same reasons.

He also excepts to the following questions and answers in the depositions of James H. Matthews:

1. He excepts to so much of the answer to question 3 as states that the money of Miss Matthews was given to Harper, and that he invested it, because incompetent as against Lloyd, trustee, and E. L. Harper.

2. He excepts to the whole of the answer to question 4 because incompetent and irrelevant as against Lloyd, trustee, and Harper.

3. He excepts to question 5 and answer thereto for same reasons as above.

4. He excepts to questions 7, 8, 9, and answers thereto for same reasons.

5. He excepts to question 10 and the entire answer thereto because the same purports to give acts, statements, directions, and statements of E. L. Harper, who is disqualified by statute as a witness, and the testimony is incompetent as against Harper or Lloyd, trustee.

6. He excepts to so much of question 12 of the witness as states that Scarlett was instrumental in getting Harper to take stock, &c., in the building association for same reasons as above.

7. He also excepts to the following questions and answers of John H. Otten:

1. He excepts to question 9 and answer thereto because incompetent and irrelevant.

2. He excepts to questions 10, 11, 12 and the answers thereto because incompetent and irrelevant.

3. He excepts to all of the answer to question 10 except the fol-

lowing: "When I asked him for this money the demand was written," because incompetent and irrelevant.

4. He excepts to question 1 and answer thereto in redirect examination of the witness because incompetent and irrelevant.

He also excepts to the following questions and answers in the deposition of Albert P. Gahr:

1. He excepts to so much of the answer to question 2 in the direct examination as undertakes to state any of the acts, statements, and admissions of E. L. Harper because the same are incompetent as against Harper and Lloyd, trustee.

2. He excepts to the question 3 and answer thereto because incompetent and irrelevant as against said E. L. Harper and Lloyd, trustee.

3. He excepts to question and answer 6 because incompetent and irrelevant.

Wherefore Lloyd, trustee, asks that his said exceptions may be sustained.

C. L. RAISIN, JR.,
TAFT & LLOYD,
*Att'ys for Lloyd, Trustee.*

And at the same term of the court, on the 11th day of May, 1888, the following order was made, to wit:

This cause is submitted on Lloyd's exceptions to depositions and on the offer to file amended answer and cross-petition of Lloyd, trustee.

And at the same term of the court, on the 14th day of May, 1888, the following order was made, to wit:

The exceptions of Lloyd, trustee, filed May 7th and 9th, 1888, to the depositions herein are overruled and Lloyd, trustee, excepts, and the amended answer and set-off and cross-petition offered May 7th, 1888, by Lloyd, trustee, the verification of the same being waived, *is* refused and Lloyd, trustee, excepts, and on his motion the same is made part of the record.

And at the same term of the court, on the 18th day of May, 1888, the following order was made, to wit:

Came Hattie A. Matthews and filed reply to the answer and cross-petition of Lloyd, trustee.

The reply of Hattie A. Matthews to answer and cross-petition of Lloyd, referred to in the foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

| | |
|---|---|
| ALBERT SILVA, Pl'ff,<br>*vs.*<br>FIDELITY NATIONAL BANK & CONSOLIDATED CASES, Def'ts. | Reply of Hattie A. Matthews to Answer and X Petition of H. P. Lloyd. |

The defendant Hattie A. Matthews, for reply to answer and cross-

petition of H. P. Lloyd's, says she admits E. L. Harper was insolvent when he assigned the building association stock to her.

She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but, as was stated in her original pleadings, this was allowable under the laws of Ohio.

She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, that there is anything which invalidates the transfer of the stock to this defendant, the same involved in the case.

Wherefore the defendant prays as in her original pleadings and for general relief.

JNO. S. DUCKER,
*Att'y for Hattie A. Matthews.*

And thereafter, at the September term of the court, on the 3rd day of September, 1888, the following order was made, to wit:

Lloyd, trustee, moved the court to set aside the judgment overruling the exceptions of May 7th and 9th, 1888, to depositions, and this cause is submitted on said motion.

And at the same term of the court, on the 5th day of September, 1888, judgment on exceptions to depositions was rendered as follows, to wit:

Mrs. Harper cannot testify against her husband. If her testimony is introduced to establish the claim of Hattie A. Matthews against the estate of Harper it is incompetent. The claim must be established by other evidence. If her evidence or testimony is used to show that Matthews is entitled to satisfaction and of a particular fund it is not perceived that such testimony is against the husband of the witness, because if Matthews is not thus satisfied her husband will remain bound to Matthews.

If Matthews' deposition was taken after Harper was sent to the penitentiary it cannot be read to establish her claim against Harper. The claim itself may be established by competent evidence. This being done, it is not perceived that Matthews may not prove an assignment to her in satisfaction of her claim which would not effect Harper, but other creditors of Harper. Hattie's deposition was given on the 16th day of April, 1888. If Harper was then in the penitentiary her deposition cannot be read to establish her claim against him. The exceptions will be retained, and on the trial the testimony to which objection is made in them will be tried by the principles stated in this judgment and order.

And at the same term of the court, on the 5th day of Sept., 1888, the following order was made, to wit:

Came Lloyd, trustee, and offered an amended answer to the amended answer and cross-petition of Matthews, Otten, &c., to the filing of which Matthews, Otten, &c., object, and on motion of Lloyd, trustee, and Matthews & Otten, &c., this cause is submitted on the offer to file same and on the whole case.

The amended answer of Lloyd, trustee, to amended answer and

cross-petition of Matthews, Otten, &c., referred to in foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA
*vs.*
FIDELITY NATIONAL BANK, &c. } Amended Answer to X Petition — Matthews.

The defendant Lloyd, trustee of E. L. Harper, says that he denies that on the 21st day of June, 1887, when it is alleged that Harper transferred the said shares of stock, as alleged in the amended answer and cross-petition of Matthews and Otten, filed January 4th, 1888, that there was due something over $7,000.00 on said note from Harper to Matthews. He denies that there was anything whatever or any sum due from Harper to Matthews on said note at said time. He denies that at the time of the alleged transfer of said stock the said building association shares were only worth the sum of $4,188.88, or that said Harper now owes the said Matthews over at least $3,000.00 yet on said indebtedness after crediting said stock. There was nothing due on said note at said time. The shares of stock were worth at said time $4,914.87.

C. L. RAISON, JR.,
*Att'y for Lloyd, Trustee.*

STATE OF KENTUCKY, }
*Campbell County.* }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney of Harlan P. Lloyd, trustee, who is now absent from this county and State, and that he believes that the statements of the foregoing amended answer are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 4th day of September, 1888.

JOHN P. SCHROLL, *Cl'k*,
By A. L. RENSCHER, *D. C.*

And thereafter, at the same term of the court, on the 7th day of September, 1888, judgment was rendered in words and figures as follows, to wit:

The said fund accrued and arising upon said 20 shares of stock of said building association involved in these causes belongs to said Lloyd, trustee, to be administered for the benefit of the creditors of E. L. Harper, and it is adjudged by the court that all the actions and cross-actions in this consolidation other than the cross-action of the said Lloyd, trustee, be, and they are hereby, dismissed at the costs respectively of the parties suing, and the attachments are discharged.

It is also adjudged by the court that said Lloyd, trustee, is the owner of and entitled to the immediate possession of said "pass book" of E. L. Harper in said building association filed by said

Matthews and Otten with their cross-petition herein, and the clerk of this court will deliver the said "pass book" to the said Lloyd, trustee. The said shares of stock in the building association of said Harper amounted, in the amounts paid in and the dividends thereon on the 13th day of July, 1887, when the same became converted into a money demand against the association, to the sum of $4,914.89.

It is adjudged that Lloyd, trustee, recover of the Fidelity Building, Savings & Loan Company for the sum of $4,914.89 without interest, and when said sum is paid said Lloyd, trustee, will deliver said "pass book" to said association. The said Lloyd, trustee, will pay the costs of these proceedings other than the costs adjudged against the parties other than said Lloyd, trustee. Hattie A. Matthews and John Otten except to this judgment and pray an appeal to the court of appeals, which is granted.

* * * * * * *

(Record, p. 59.)

Afterwards, at a court of appeals held on the 24th day of October, 1889, the following order was entered herein, to wit:

This cause came on and was heard.

Afterwards, at a court of appeals held on the 27th day of Feb., 1890, the following order was entered herein, to wit:

The court being sufficiently advised, it seems to them that the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded, with directions to render a judgment in conformity to the opinion herein, which is ordered to be certified to said court. It is further considered that appellant recover of appellees costs herein.

* * * * * * *

(Record, pp. 94 to 100, incl.)

* * * * * * *

Afterwards, at a court held on the 26th day of April, 1890, the court being sufficiently advised, the opinion is extended on its face and the petition for rehearing is overruled.

*Extended Opinion.*

June 21st, 1887, E. L. Harper made an assignment for the benefit of his creditors.

A few hours before doing so he directed the brother of the appellant, Hattie A. Mathews, to get John Otten to go to an office of the Fidelity Loan Company and get from him his, Harper's, "pass book" evidencing his ownership of twenty shares of stock in the company, then worth from four to five thousand dollars, and draw the value of it by a withdrawal from the company and pay it over to the appellant, Hattie A. Matthews. Otten got the pass book, but found he could not draw the money without an assignment of the stock from Harper. He was selected to do so because it was supposed that his relations with the company would enable him to readily get the money. Not succeeding, he took the pass book to the brother, who filled up an assignment of the stock upon a leaf of it in Otten's name and procured Harper to sign it. It was then delivered to her brother for the appellant, Hattie A. Matthews. He then gave it to Otten in order that he might draw the value of it from the company and pay it to her. The company declined, however, to comply with the request, as when it was made Harper had made the assignment for the benefit of his creditors. The transfer of the stock did not show that it was for the benefit of Hattie A. Matthews, but this was the understanding at the time of all the parties, as it is indisputably shown by the evidence.

It, aside from that of the appellant, Hattie A. Mathews, and Harper's wife, whose testimony was objected to because he was in the penitentiary and one of them was his wife, also shows that at the time of the transfer he was indebted to the appellant, Mathews, in a sum greater than the value of the stock, and that it was made by way of part payment.

It is therefore unnecessary to determine the competency of the appellant and Harper's wife as witnesses or whether any portion of their testimony is competent. It appears that the appellant received from her father's estate in 1880 about one thousand dollars. She then resided with Harper, who was her brother-in-law, and continued to do so up to the time of his failure and perhaps longer. She turned the money over to him for investment. He was then a wealthy man, and continued to be so regarded until shortly before his failure. He was utterly wrecked financially, and became an inmate of a prison through reckless speculation, which, *ignis fatuus* like, led him on even to the commission of crime. The investment for her

by him resulted in great gain in a short time, and in settlement of what was coming to her through it he, on August 8th, 1881, executed to her his note for five thousand dollars, no part of which had been paid at the time of his failure, save the interest to January 1st, 1882.

June 24th, 1887, certain of his creditors served out attachments in the Campbell chancery court and attached the interest in the loan company that had been transferred to the appellant, but in the name of Otten, for the purpose of collection for her. September 16, 1887, she, by answer and cross-petition against the trustee of Harper under the deed of assignment, became a party to the consolidated suits of these creditors. She claimed the stock, her pleadings setting forth the grounds of her claim and Otten joining with her in it. January 4th, 1888, the trustee, in answer to her cross-action, set up a claim to the stock under the deed of assignment. The creditors are not parties to this appeal, nor are their pleadings made a part of the record before us.

In the consideration of the matters involved we will waive the question of the right of the trustee to assert in a suit a claim to the stock when the assignor in the voluntary assignment could not do so.

The evidence fails to show that the appellant's *dede* was a fraudulent one, nor is a state of circumstances shown from which we are authorize- to presume it. This is also true as to her claim to the stock in the loan company, based upon the transfer in Otten's name. No fraudulent purpose is shown even by inference. It was, however, undoubtedly intended as a preference of the appellant as a creditor by Harper as a debtor. Indeed, this is expressly admitted by her pleadings.

The parties all resided in Ohio and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there. At common law a debtor had a right to prefer a creditor, either by a payment or an express preference, in a deed of assignment. He has a right to pay his debt, and it is only by virtue of statutory law that such a payment can be held invalid and the creditor compelled to surrender his advantage.

In the absence of any showing of the existence of such a statute in another State, it must be presumed that the common law is in force there.

Honore *v.* Hutchings, 8 Bush., 687.
Miles *v.* Collins, 1 Met., 308.

The appellee has in his pleadings set out a section of an Ohio statute which reads thus: "All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trust arising under the same shall be administered in conformity to the provisions of this chapter," and which he claims invalidates a preference like this one. We are unable to judge of it by its title

and its other sections, as the entire statute is not before us. It does not appear to us, however, to embrace a case like this one, but to relate alone to preferences made in deeds of assignments to trustees for creditors generally.

Certainly no such trust was created in the transfer of this stock as this statute contemplates. None was intended. Otten was not named as trustee for the appellant. He was but an agent to draw the value of the stock for her, and then at once to pay it over to her.

The preference was a *bona fide* one. It was made by the assignment and delivery of the written evidence of the ownership of the stock. The preponderance of the testimony shows that the transfer was made in the morning and the assignment not until the evening of the same day. In any event, they were not made or even prepared at the same time. It was not one transaction, and the written transfer of the stock and the assignment cannot upon the evidence be regarded as really constituting but one instrument. If they could be, then the transfer of the stock would, perhaps, fall within the interdiction of the statute as being in fact a part of the deed of assignment.

The rules of the common law govern the transaction, and, when so considered, it is not invalid, because a payment of a pre-existing debt in view of coming insolvency is not forbidden by them.

It is urged that such a preference is contrary to the statute of this State, and will not therefore be upheld by its courts. It is true, comity does not require one State to violate its own laws to enforce those of another. Such a preference is not fraudulent or void, however, under our statute. Upon the contrary, it operates as an assignment, not only of the particular property embraced by the preference, but of all the debtor owns for the payment of his debts *pro rata*, provided advantage be taken of it in the manner and within the time prescribed by the statute. It merely inures to the benefit of all the creditors if they or any of them so ask in proper time and manner. It is a privilege given them.

If an assignment made in another State and valid there be contrary to the law or the settled policy of this State, it will not be enforced here to the prejudice of our own citizen creditors.

It does not appear, however, that any citizen of this State will be prejudiced by the preference in question. The appellant may certainly come into court and assert her claim. She may sue. Her adversary is a non-resident. It does not appear that any of the creditors are residents. If any presumption is to be indulged, it is that they are residents of Ohio, where this transaction occurred, because the deed of assignment was made there and the trustee resides there. No citizen of this State is questioning her right. Under this state of the case the appellant, inasmuch as the preference was valid where made, should not, in our opinion, be turned out of court.

The appellee is not in a position to deny the right of the appellant to relief because Harper was not before the court upon the cross-pleadings. She is claiming to be the owner of the stock and did become at least the equitable owner by the transfer to Otten,

the legal title being in him. The appellee claims it under the deed of assignment to him. In any event, Harper is not the owner, and he was not therefore a necessary party to the contest over the ownership between these two claimants. He had parted with the right to it to one or the other of them, beyond all question.

It is urged that the second paragraph of the answer and reply of the trustee, in which it is averred in affirmative form that at the time the transfer was made Harper was contemplating an assignment, and that it was therefore fraudulent, and so in fact, is undenied, and that it must therefore be so held. Its averments must, however, be regarded as statements *negotiating* those of the cross-petition of the appellant. It is therein averred that the transfer was *bona fide* and upon sufficient consideration, and these averments of the answer and reply of the appellee are in substance but contradictory of them, although couched in affirmative language.

The transfer was in fact made. It was not fraudulent, nor as a preference was it forbidden by the *lex loci*, and it must be upheld.

The judgment is reversed, with directions to render one for the appellant in conformity to this opinion.

* * * * * * *

Supreme Court of [illegible]

OCTOBER TERM, [illegible]

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Harlan P. Lloyd, Assignee of [illegible]

Plaintiff in Error,

vs.

Hattie A. Mathews and J. H. [illegible]

Defendants in Error.

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IN ERROR TO THE COURT OF APPEALS OF THE [illegible] DISTRICT.

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Brief for Plaintiff in Error, on motion [illegible] sents in Error to dismiss this [illegible] diction, set for hearing April 25, 1910.

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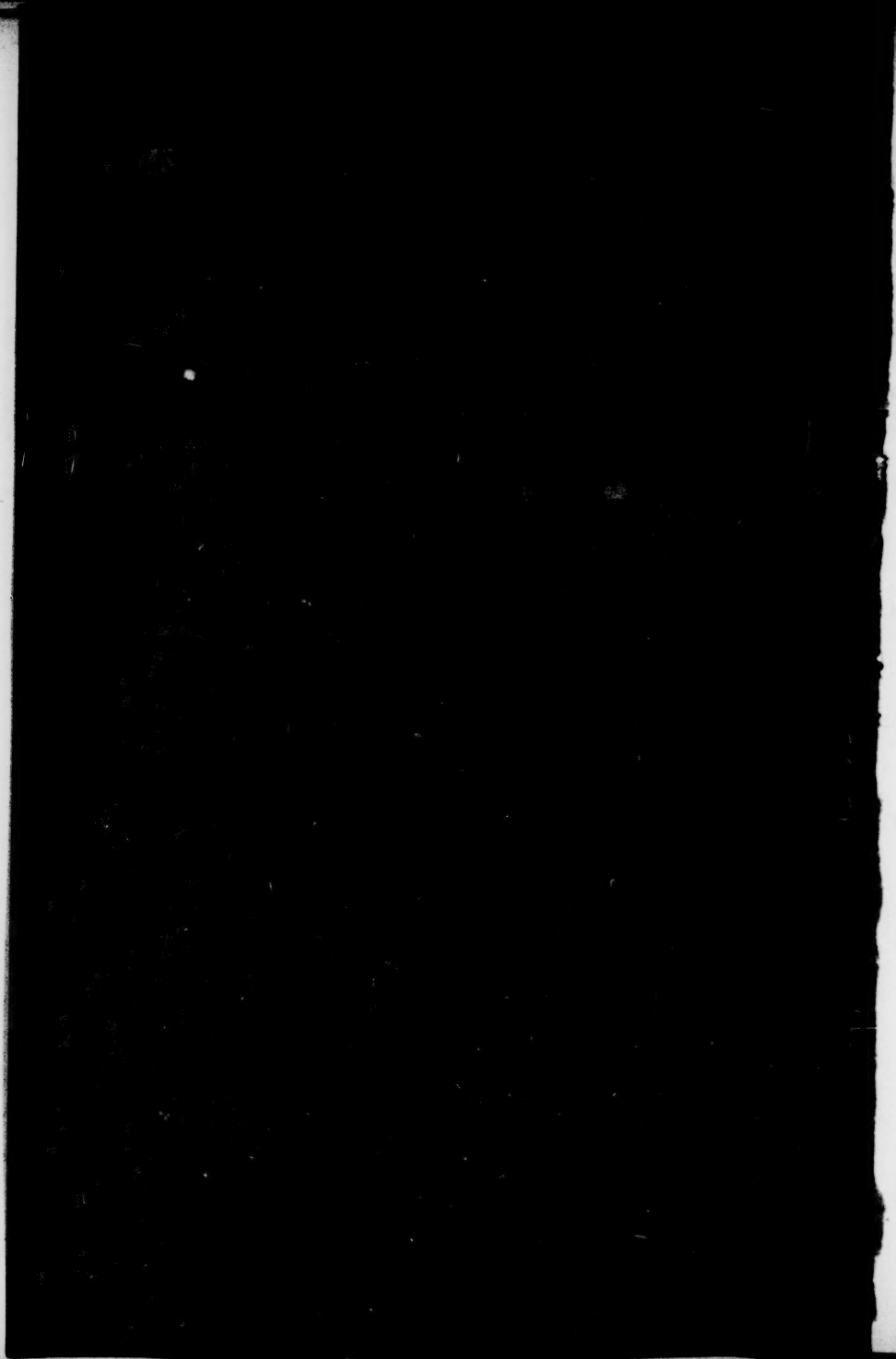
H. P. LLOYD,
C. L. BARNES, Jr.



*Robert Clarke & Co., Printers.*] [*April, 1892.*

# Supreme Court of the United States,

## OCTOBER TERM, 1891.

**Term No. 1,014.**

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*Harlan P. Lloyd, Assignee of E. L. Harper,*
*Plaintiff in Error,*

*vs.*

*Hattie A. Mathews and J. H. Otten,*
*Defendants in Error.*

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**IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.**

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**Brief for Plaintiff in Error, on motion filed by Defendants in Error to dismiss the case for want of jurisdiction, set for hearing April 25, 1892.**

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This is a motion of defendants in error to dismiss the writ for want of jurisdiction, under Rule 6 of this court. Joined with it is a motion to affirm the judgment.

### FIRST.

Plaintiff in error, at the outset, objects to the consideration of this motion by the court, on the ground that the essential parts of the record have not been printed, as required by the rules of this court, in order fully to present the questions involved in the motion.

In the record filed in this court, page 26, appears the amended answer of H. P. Lloyd, trustee of E. L. Harper, filed in the Campbell Chancery Court, and which was submitted to the chancellor at the hearing of the case. This amended answer formed a part of the record in the Court of Appeals of Kentucky, and is an essential part of the record on file with the clerk of the Supreme Court in this case. A reference to this answer will show that this court can not properly pass upon this motion without having the complete record before it.

The same remarks apply, with still greater force, to the petition of Lloyd, trustee, for a rehearing in the Court of Appeals of Kentucky, which appears upon page 63 of the record filed with the clerk in this case. In this petition for rehearing, which was filed according to the regular practice in the courts of Kentucky, there are set forth all the necessary averments, showing, even more fully than was done in the court below, the statutes and decisions of Ohio, under which Lloyd, trustee, claimed relief in the Kentucky Court of Appeal, and showing that a federal question was necessarily involved in the decision of the case as presented in the Court of Appeals of the State of Kentucky.

The testimony of A. P. Gahr, on page 52 of the record, is also omitted.

For the failure of defendants in error to print in their extracts these necessary parts of the record, which are absolutely essential to a proper consideration and determination of this case, the plaintiff in error asks that the pending motion may be overruled. The complete record will then be printed, and submitted to the court when it shall be reached for final hearing.

This should dispose of the motion, without further

examination by the court. That which follows is added only for the information of the court, in case the court should take a different view of the effect of these fatal omissions.

## SECOND.

*Statement of the case.*

The following statement of facts will be of service to the court, in case it should desire to give any further attention to the motion.

On the 21st day of June, 1887, Edward L. Harper was, and for several years previously had been, a citizen and resident of the city of Cincinnati and State of Ohio. He was the vice-president and principal manager of the Fidelity National Bank, in the city of Cincinnati. He was the president of Swift's Iron & Steel Works, in Newport, Kentucky. He was the senior member of the firm of E. L. Harper & Co., largely engaged in the iron commission business, and was also doing an extensive business in his individual name as E. L. Harper. For some years prior to 1887, he had been largely engaged in speculations, and in 1887 was engaged in an enormous wheat gambling transaction in the city of Chicago, the result of which was very disastrous to him financially, was fatally disastrous to the bank of which he was manager, to the iron and steel works of which he was president, and to the business firms with which he was connected. The bank, the steel works, the business firm, and the individual, all were insolvent, and the failure of all these followed as the result of Harper's heavy losses in wheat gambling. The comptroller of the currency closed the bank on the 21st day of June, 1887, and the steel works, the firm of E. L. Harper & Co., and E. L. Harper, indi-

vidually, executed and filed in court their assignments upon the same day.

The testimony of A. P. Gahr, which forms a part of the record (page 52) in the clerk's office in this case, shows that Harper was hopelessly insolvent for some time prior to June 21, 1887, and that, as early as June 14, 1887, he had told his confidential clerk (Gahr) that he, Harper, was a ruined man, and that a general assignment by him, for the benefit of his creditors, was only a question of hours or days at the most. In the forenoon of June 21, 1887, Harper made a general assignment of his individual assets, for the equal benefit of all his creditors, under the general insolvent law of the State of Ohio. This deed of assignment was immediately placed upon record in the Probate Court of Hamilton county, Ohio, of which state and county Harper then was, and still is, a resident. All the proceedings in relation to this assignment were perfectly regular, and according to the law of the state. The assignee named in the deed accepted the trust, but failed to qualify by filing the requisite bond, and thereafter resigned the position of assignee; whereupon, in accordance with the statute of Ohio, in such case made and provided, Harlan P. Lloyd was appointed trustee under the said deed of assignment, to take possession of all the assets for the benefit of the creditors, and with all the powers and duties of the original assignee. Lloyd, trustee, is the plaintiff in error in this action.

Hattie A. Mathews is a sister-in-law of E. L. Harper, had been for a long time an inmate of Harper's family in Cincinnati, Ohio; she was such inmate at the date of Harper's assignment, and was a citizen and resident of Ohio on the 21st day of June, 1887.

On this said date, Harper, individually, owned twenty

shares in the Fidelity Loan and Building Association of Newport, Ky., which ownership was evidenced by a certain pass-book, issued by the association, and which was at that time in Harper's possession. The value of these twenty shares amounted to $4,919.89.

On or before the 14th day of June, 1887, E. L. Harper, with full knowledge of his insolvency, had determined in his own mind to make a general assignment for the benefit of his creditors. With this determination and intent fully formed, a week thereafter, to-wit: On the 21st day of June, 1887, E. L. Harper took the pass-book issued by the said building association, and transferred and assigned to the defendant, John H. Otten, as trustee for Hattie A. Mathews, the said twenty shares in the said association, by signing a form for that purpose, and delivered the book and transfer to Otten, trustee, with instructions to collect the money from the association, as trustee, and to pay it over to Hattie A. Mathews, as beneficiary of the trust. Otten, as such trustee, was unable to obtain the money from the building association, because Harper's assignment had taken place on the same day, and the officers of the association had good reason to believe that this attempted transfer was void, and that the money belonged to Harper's individual assignee, under the laws of the State of Ohio. These officers properly refused payment to Otten.

A few days later certain depositors of the Fidelity National Bank brought suits in the Campbell County, Kentucky, Chancery Court, against E. L. Harper, alleging that they were depositors, and that they had a right to collect the amounts of their deposits from the individual property of E. L. Harper in the State of Kentucky. They obtained attachments from the Campbell Chancery Court, and had

the attachments served upon the building association aforesaid, seeking thus to hold the twenty shares of stock belonging to Harper for the payment of their respective deposits in the Fidelity National Bank. Learning of these suits, Lloyd, trustee, proceeded to defend his trust, as he was bound to do, in the Campbell County Chancery Court of Kentucky. He was made a party to the proceeding, filed a plea, in which he set up at length all of the facts in the case, and especially the assignment of Harper on the 21st of June, 1887, under the insolvent law of the State of Ohio, the judicial proceedings in the Probate Court of Hamilton County, Ohio, the fact that Harper and Hattie A. Mathews were both residents of the State of Ohio on the said 21st day of June; he also alleged his regular appointment as trustee, and his claim, as such trustee, to the proceeds of the twenty shares of stock in the Fidelity Building Association of Newport, and denied all the claims in the various petitions of the plaintiffs.

At a later date the said John H. Otten, trustee for Mathews, and Hattie A. Mathews, beneficiary of the trust, were made parties defendant in the actions, which were thereupon consolidated, and the petition of Otten, trustee, and of Mathews, was filed in the Chancery Court as a cross-petition against Lloyd, trustee of E. L. Harper.

To this cross petition, Lloyd, trustee, filed an answer, repeating, so far as was necessary, the averments in his first petition, setting out in detail Harper's insolvency for a considerable time prior to the execution and filing of his deed of assignment, alleging Harper's design to prefer Mathews, through the medium of a trustee, to his other creditors, in violation of the statute law of the State of Ohio; also, the fact that Otten, trustee, and Mathews, had knowledge of Harper's insolvency, and that in making this

fraudulent preference, Harper had in contemplation his own insolvency and the making of a deed of general assignment.

Lloyd, trustee, also set forth in full the judicial proceedings in the Probate Court of Hamilton County, Ohio, alleging the force and effect thereof, and the faith and credit to be given them, and his claim under the insolvency proceedings in said court.

Lloyd, trustee, in this pleading also set up in full, sec. 6343 of the Rev. Stat. of Ohio, found in Smith & Benedict's edition of the Statutes of Ohio, 1890, Ch. 4, Vol. 4, relating to insolvent debtors, and the section was fully set forth *in haec verba:*

"Sec. 6343. (*Assignments in contemplation of insolvency to inure to the benefit of all the creditors.*)

"All assignments in trust, to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims; and the trusts arising under the same shall be administered in conformity with the provisions of this chapter." (V. 56, p. 231, sec. 13, S. & C. 712.)

In the same pleading, Lloyd, trustee, also set up sec. 4196 of the Rev. Stat. of Ohio, Smith & Benedict's edition, 1890, Tit. 4, Ch. 4, and alleged that under this section of the Ohio Statutes, the attempted transfer of the shares by Harper to Otten, trustee, was fraudulent and void. The pleading showed the section *in haec verba* as follows:

"Sec. 5196. (*Gifts, grants, etc., to defraud creditors void.*)

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods

or chattels, shall be deemed utterly void and of no effect." (29 v. 218, sec. 2; S. & C. 656.)

No reply was made by either of the defendants to these pleadings and these allegations as to the Ohio statutes, and to the effect thereof, were thus deemed to be true by the rules of practice in the Kentucky Chancery Court, and the sections of the Revised Statutes of Ohio, and the effect thereof, were admitted as alleged, and were admitted to be fully and properly set forth in the pleadings. The only further pleading filed by the defendants Mathews or Otten, trustee, was a brief one, in which Mathews expressly admitted that E. L. Harper intended by the attempted transfer of the said shares to prefer her over his other creditors.

Testimony was taken, and the whole case was submitted to the Chancery Court of Campbell County, whereupon the chancellor decided that the claims of Lloyd, trustee, were well-founded; that the statutes of Ohio, as pleaded, must govern the case, and that the Ohio decisions, construing said statutes, should be followed, because the contesting parties were all residents of the State of Ohio, where the assignment took place, and where the entire transaction occurred. The cross-petition of Otten, trustee, and of Mathews was dismissed, and a decree was rendered by the Chancery Court in favor of Lloyd, trustee, for the full value of the said twenty shares of stock in the said Fidelity Building Association. From this decision of the chancellor, Mathews and Otten, trustee, took an appeal to the Court of Appeals of Kentucky.

Under the Civil Code of Procedure in Kentucky, an appellant is not required to take up the entire pleadings and the entire testimony in the case, but may select, at his option, such portions as he deems important for his pur-

pose, and leave the remainder of the pleadings and evidence in the court below. The appellee is not consulted as to this, nor has he any voice in regard to the matter. He is summoned in the Court of Appeals; and, without an opportunity to see the brief or to hear the argument of his adversary, is compelled to make good his own position upon the record, however imperfect that record may be, and however meager the knowledge afforded to the reviewing court by such defective record.

In the case at bar, Mathews, appellant from the Chancery Court of Campbell County, did not take to the Court of Appeals the pleading first filed by Lloyd, trustee, in this action, nor did she take to the Appellate Court the testimony showing the proceedings of the Probate Court of Hamilton County, Ohio, which were duly authenticated according to the act of congress, nor the Ohio statutes and decisions which were before the Chancery Court of Campbell County, Kentucky, on the submission of the case. But as all of these material allegations, and the testimony in support of them, were deemed to be admitted by the failure of Mathews to deny or controvert them, and, as there was no denial of the statute law of Ohio, as pleaded, or of the Ohio decisions or the proceedings of the Ohio courts, argument was made and heard in the Court of Appeals of Kentucky, as if the entire record had been before it.

The decision of the Chancery Court was based upon the construction of the statutes and decisions of the Ohio courts, and was properly in favor of Lloyd, trustee of E. L. Harper. The Court of Appeals of Kentucky, as a reviewing court, reviewing solely the questions of law, necessarily construed the same statutes and decisions of Ohio, and gave its opinion adverse to the force and construction of the Ohio statutes, which had been given to

them theretofore by the courts of Ohio. This erroneous decision of the Court of Appeals, in refusing to give to the probate proceedings in Ohio, to the statutes of Ohio, and to the decisions of the Ohio courts upon such statutes, the force and effect set up and asserted by Lloyd, trustee, was excepted to at the time; and, in accordance with the Civil Code of Procedure of the State of Kentucky, a petition for rehearing was filed in the said Court of Appeals, and this petition for rehearing, as we have heretofore shown under the first subdivision of this brief, should have been printed in full with the extracts of the transcript of the record furnished to the court for the purpose of this motion. A decision of the Court of Appeals was rendered upon this petition for rehearing, and the opinion is found upon pp. 1, 2, 3, and 4 of the appendix to the printed extracts. It there appears that the final decision of the Court of Appeals was adverse to the claim of Lloyd, trustee, a federal question was thus clearly presented, and we claim the right to have it reviewed by this court.

## THIRD.

### *Argument.*

*First.*—It is evident that the first and principal point to be decided is, Does this case present a federal question?

*A.* It does not seem necessary to make an extended argument upon this point. The article of the federal constitution, under which we claim, the frequent decisions of this court thereon, and the principles governing this entire class of cases, are all so familiar to this court that the argument may be made very briefly.

*B.* The record shows (pp. 1, 2, 4, 5) that all the parties to this case were residents of the State of Ohio, that

the entire transactions took place within the limits of that state in accordance with the laws thereof; and this being so, the Ohio statutes operated as immediately and as effectively upon Otten, trustee, and upon Mathews, as upon any other of the numerous creditors of E. L. Harper.

*C.* The court will also observe that this case does not call into action the rule of comity, which sometimes prevails where the litigants are inhabitants of different states; for instance, if Mathews had been a resident of the State of Kentucky, she might have invoked the jurisdiction of the Kentucky courts to protect her against the assumption on the part of a foreign assignee, and have claimed that the comity which prevails between states does not require the rights of a citizen of Kentucky to be impaired by reason of any statute law of Ohio or any judicial proceedings under said law, as the jurisdiction of the Ohio courts would necessarily be bounded by the territorial limits of the state.

*D.* On the contrary, Lloyd, trustee, went into the State of Kentucky on an equal footing with Mathews in every respect, and stood in a position to claim all the protection, rights, and immunities and privileges which Mathews could claim. There was no reason why the Court of Appeals should ignore the Ohio law and the Ohio decisions, and give Mathews a judgment to which she was not entitled, and which she never could have obtained in the State of Ohio. There was every reason why that court should have considered the whole case under the Ohio statutes and decisions, and should have given full faith and credit to them.

*E.* The learned court seems to have fallen into an error, and in the opinion rendered to have made statements irreconcilable with each other.

On page 2 of the appendix to the printed extracts, the Court of Appeals said:

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity therefore is to be decided by the law in force there. . . . The appellee has, in his pleading, set out a section of the Ohio statutes, which reads thus: 'All assignments in trust to a trustee or trustees made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors,'" etc.

And, again, upon page 3 of the appendix, the same court says:

"The rules of the common law govern the transaction."

*F.* These statements appear to be contradictory to each other, but, be that as it may, the learned court proceeded to consider the claim made by Lloyd, trustee, under this section 6343 of the Revised Statutes of Ohio, and decided against the validity of the claim and against the application of the Ohio statutes, saying, on page 3 of the appendix:

"It does not appear to us, however, to embrace a case like this one, but relates alone to the preferences made in deeds of assignments to trustees for creditors generally."

This was an obvious error on the part of the Court of Appeals, and is a plain misapprehension of the statute, which refers directly to assignments made in trust to a trustee, with intent to prefer one or more creditors, and declares that such trust shall inure to the equal benefit of all creditors.

The Supreme Court of Ohio had considered this statute in a case reported in 4 Ohio State Reports, p. 602,

*Harkrader et al.* v. *Leiby et al.*, and we give two clauses of the syllabus:

"L, an insolvent debtor, and in contemplation of such insolvency, made a conveyance by mortgage to three persons, conditioned to be void, if he should save them harmless upon certain indorsements made by them for his benefit to divers persons, and should also pay to certain others of his creditors the certain sums of money owing by him to them. *Held:*

"1. That such conveyance is, in substance and legal effect, an assignment within the purview of the act of 1838, relating to assignments by insolvent debtors to trustees, with the design to prefer one or more creditors to the exclusion of others, and by the force of that act is made to inure to the benefit of all the creditors in proportion to their respective demands."

"5. Where such interest is received by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of *all* his creditors, and distributes the fund to all, in proportion to their respective demands."

This act of 1838, of the Ohio laws, has been already quoted in this brief, and is the same law which was set forth in full in the original pleading filed by Lloyd, trustee, and was the act in force in Ohio, on the 21st day of June, 1887, when E. L. Harper attempted to make this fraudulent preference, through the medium of a trustee, for the benefit of Mathews, and on the day when he made his general assignment for the benefit of all his creditors.

In the case at bar there was an attempt to assign, through the medium of a trustee, twenty shares of stock, and to prefer one of the creditors to the exclusion of all others. This was made in contemplation of insolvency, and the overt act of making a general assignment, followed immediately thereafter. Every element necessary to render operative and effective this provision of the Ohio stat-

ute was present, and the decisions show that the object of the statute was to reach cases like the one at bar.

*Hull* v. *Jeffery*, 8 Ohio, 391, 392.
*Bloom* v. *Noggle*, 4 Ohio St. 56, 57.
*Dickson* v. *Rawson*, 5 Ohio St. 224.
*Williams* v. *Englebrecht*, 37 Ohio St. 386.
*Hitesman* v. *Donnel*, 40 Ohio St. 294.

In *Dixon* v. *Rawson*, 5 O. St. 218, on p. 222 of the opinion, the court uses the following language:

To bring the case within the operation of the statute, the conveyance must be in trust, and the person receiving the property is thereby constituted a trustee for some one or more of the creditors of the debtor, to the exclusion of others. Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether, by the terms of the instrument or by necessary implication, he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it.

*If a court of chancery, at the instance of the creditor, would compel him thus to account, the character of the transfer and his own position are thereby determined; and the statute then steps in and enlarges the trust, and makes it inure to the benefit of all creditors, and distributes the fund to all in proportion to their respective demands.*"

*G.* Ignoring these decisions, and misconstruing the statute, the Court of Appeals decided adversely to the claim of Lloyd, trustee, and, later in the opinion, added these words:

"The transfer was, in fact made, it was not fraudulent, nor as a preference was it forbidden by the *lex loci*, and it must be upheld."

This denial by the court, to Lloyd, trustee, of his express rights under the Ohio statutes, raises a federal question, and justifies the issuance of the writ of error by this court.

In *Green* v. *Van Buskirk*, 5 Wallace, 307, it was held:

"The refusal of the state court, in which suit may be tried to give to the proceedings of the court, under which the property was sold, the same effect in their operation upon the title, as they have by law and usage in the state where they took place, constitutes a proper case for review in this court, under the twenty-fifth section of the Judiciary Act."

The motion to dismiss was therefore overruled, and the case was retained by this court for hearing upon the merits. The case came on for final hearing at the October term, 1868. It is reported in 7 Wallace, 139. We quote from the syllabus as follows:

"Held by this court, that by such judgment the full faith and credit required by the federal constitution had not been given in the State of New York to the judicial proceedings of the State of Illinois, and that so the judgment below was erroneous."

This opinion was delivered by Mr. Justice Davis, and was concurred in by all the members of the court. The judgment of the Supreme Court of the State of New York was reversed, and the cause was remitted to that court with instructions to enter judgment for the plaintiffs in error.

See also Sec. 1, Art. 4, of the Constitution of the United States.

In the case at bar, it is evident that the Court of Appeals could not have rendered the opinion, parts of which are above cited, unless it had passed directly upon the Ohio statutes, and that the consideration and construction of these statutes formed an essential part of the opinion rendered by the Court of Appeals. The writ of error, therefore, can not be dismissed.

*Second.* The deed of assignment from Harper, under which Lloyd, trustee, claims, was filed and recorded in the Probate Court of Hamilton County, Ohio, and regular judicial proceedings were had in said court, according to the statute in such case made and provided. A certified copy of this assignment and all the proceedings of the Probate Court thereunder, duly authenticated according to the act of congress for use in another state, was presented in the Chancery Court of Campbell County, Kentucky. The statutes of Ohio relating to this matter were also before the Chancery Court, and the chancellor passed upon all these records, and gave proper faith and credit to them, sustaining the validity of the proceedings in the Ohio court under the Ohio law. When Mathews appealed from the decree thus rendered in the court below to the Court of Appeals of Kentucky, the issue presented in the higher court was necessarily an issue raised upon the claim presented by Lloyd, trustee, under the proceedings of the Probate Court of Hamilton County, Ohio. He claimed in the Chancery Court, and he claimed in the Court of Appeals, that these proceedings should have the same faith and credit in Kentucky as by law and by usage they would have had if the controversy had taken place in the courts of Ohio. The refusal of the Court of Appeals of Kentucky to give these proceedings their proper force and effect was a denial of the constitutional rights of Lloyd, trustee, and entitled him to have the judgment reviewed by the Supreme Court of the United States.

In the case of *Crapo* v. *Kelley*, 16 Wallace, 610, where a question was raised as to the jurisdiction of the Supreme Court to review a decision of a New York court, it was held:

"That the New York court necessarily decided what

effect the insolvency proceedings in Massachusetts had, by the law and usage in that state, and that, as it decided against the effect which the defendant set up for them, this court has jurisdiction to review the judgment of the New York court."

See also *Cole* v. *Cunningham*, 133 U. S. 107.

The Court of Appeals of Kentucky was necessarily compelled to pass and did pass upon the question as to the effect of the insolvency proceedings in Ohio, and its decision was against the effect which Lloyd, trustee, set up and claimed for them. It has long been settled in this court, that whenever a question or issue, which makes a federal question, is so presented by the pleadings that the court must necessarily pass upon it in deciding the case, that then the federal question is raised in the case in such a manner as to justify a review by this court of the judgment of the state court.

*Victory*, 6 Wall. 382.

*Murdock* v. *The City of Memphis*, 20 Wall. 591.

In this case the court say (on p. 591):

"2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of federal law must control the whole case, or that there has been no decision by the state court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will

either render such judgment here as the state court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require."

*Chouteau* v. *Gibson*, 111 U. S. 220.

We are clearly entitled to have the questions on this branch of the case, and which were presented in the original pleading filed in the Chancery Court, and which were supported by proper proof in the record duly authenticated according to the act of congress, reviewed by this court.

The recent case of *Smith's Middlings Purifier Co.* v. *McGroarty*, decided in this court, and reported in 136 U. S., p. 237, reviews the Ohio statutes in regard to the filing of a voluntary assignment for the benefit of creditors, and the statutes relating to insolvency. Although one of the parties to the suit was a citizen of the state of New York, the court held (p. 241):

"The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and admitted by the demurrer, and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio."

We respectfully claim that the application of this principle is conclusive in favor of the plaintiff in error on the pending action.

## FOURTH.

*First.* Coming now briefly to examine the points made by counsel for appellee, in the brief filed with the motion, let us first examine the general statutes of Kentucky and the rules of practice of her courts applicable to a case of this character. This will greatly facilitate the determination

of the question involved. See General Statutes of Kentucky, chapter 28, art. 2, sec. 10, found on page 346, as follows (referring to the Court of Appeals):

"The decisions of the court must be so written as to show the governing principle thereof, except in cases involving matters of fact only. The court must deliver written opinions in all cases."

See also, Civil Code of Practice of Kentucky, Carroll's edition, 1888, title 18, chap. 3, sec. 760, p. 341:

"Sec. 760. *The court may make rules when mandate shall issue.* 1. The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases and motions, and the manner and time of presenting motions or petitions for rehearing therein, and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same; provided that no mandate shall issue, nor decision become final until after 30 days, including Sundays, from the day on which the decision is rendered, unless the case, in appeal cases, otherwise direct; and if said 30 days expire during the vacation or recess of the court, a written order of one of its judges filed in its clerk's office within said 30 days, shall have the same effect to suspend a mandate, by allowing a petition for rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court."

Under the authority thus granted by the legislature, the Court of Appeals of Kentucky, on the 15th of March, 1884, adopted Rule 19, which is duly entered upon the record and is published annually for the information of all litigants:

"Petitions for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the court, or that a decision is in conflict with a statute, or with a controlling decision, to which the attention of the court was not drawn, through neglect or inadvertence of counsel. Any

petition violative of this rule will not be presented to be filed, and if filed, will be stricken from the record."

Rule 20, adopted June 16, 1887, is as follows:

"Ordered, that where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges."

From the statute it appears that, in Kentucky, no decision can become final until after the expiration of thirty days from the day on which the decision is rendered; and it is further provided that no mandate shall issue during that time. No decree can be rendered by the Court of Appeals until its final decision; and the rules provide that the petition for rehearing, to be filed at any time before the decision becomes final, must clearly show from the record that some question duly submitted by counsel and decisive of the case, has been overlooked by the court.

The record in this case shows that within the proper time after the first decision by the Court of Appeals, Lloyd, trustee, filed his petition for rehearing, setting forth exactly the ground contemplated by Rule 19, and in that petition it was clearly shown that this federal question had been duly submitted in the original trial court, that it had been duly submitted by counsel in the Court of Appeals, *that it was decisive of the case*, and that *it had been overlooked by the court.*

Plaintiff in error was thus brought within the direct and explicit provisions of the Civil Code of Practice of Kentucky, and within the scope of the rules of the Court of Appeals, framed in pursuance therewith. The federal

question had been presented in the lower court, and was presented in the Appellate Court. The statement by counsel for defendant in error, in the printed brief, that the federal question was first presented in the petition for rehearing, is erroneous. But, even if it had been there first presented, it would still be in time, as no final decision and no final decree had then been rendered in the case. The entire conduct of the plaintiff in error in the Court of Appeals was perfectly regular and in strict accordance with the Code of Civil Practice of that state. If any decision in other states has been rendered in apparent conflict with this position, it has been in states where the civil practice was essentially different from that in force in the State of Kentucky.

It is probably unnecessary to cite the Kentucky decisions in support of these statements, but the following case may be examined.

A petition for a rehearing suspends the judgment of the Court of Appeals until the petition is disposed of at the same or a future term, without an express order of suspension.

*Turner* v. *Booker*, 2 Dana (Ky.), 335.

*Second.* It is said by defendants in error that the decision of the Court of Appeals was founded upon principles of general law, as administered by the courts of this country.

There is a clause in the opinion to the effect that the principles of the common law must prevail, but this statement is made only after an examination of the Ohio statutes, and after a construction had been put upon them adverse to the decisions in Ohio, and adverse to the claims made by Lloyd, trustee. In other words, the federal

question was first passed upon by the Court of Appeals, and was decided adversely to the claimant, the present plaintiff in error. This, in apparent contradiction of its previous statement, that

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there."

Later in the opinion, the court state as follows:

"The rules of the common law govern the transaction, and when so considered it is not invalid."

See pp. 2 and 3, Appendix to Extracts.

It thus appears that the principles of general law were not thought of or considered until the federal question had been previously determined.

*Third.* It is also said, in the brief filed by defendants in error, p. 7:

"No issue is raised in the pleading as to the correctness of the quotation from the Ohio statutes by the plaintiff in error."

The Ohio statutes were set forth in full in the pleading filed by Lloyd, trustee, in the Chancery Court of Campbell County. These statutes have been before every tribunal in which this case has hitherto been heard. They are before this court. Plaintiff in error has never waived his rights nor failed to assert them.

In the Civil Code of Practice of Kentucky, Carroll's Ed., 1888, Title 7, ch. 7, sec. 126, is found the following:

"Every material allegation of a pleading must, for the purpose of the action, be taken as true, unless specifically traversed, excepting these, which must be proved though not traversed.

1. Allegations of a petition or cross-petition against a defendant who is under any disability except coverture.

2. Allegations of an answer or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

3. Allegations against a defendant, constructively summoned, who has not appeared in the action.

4. Allegations concerning value or amount of damage, not accompanied by the allegations of an express promise, or by statements of facts showing implied promise to pay said value or damage, such allegations so accompanied need not be proved unless traversed.

Sec. 127. A material allegation is one which is necessary for the statement or support of a cause of action or defense."

It will thus be seen that when the Ohio statutes were fully set forth and pleaded *in haec verba*, and when, by the admission of opposite counsel and otherwise, it appears that no issue was made as to the existence or the force and effect of these statutes, it was not necessary to introduce proof to substantiate these averments. These were material allegations, and by the precise language of the Kentuck statute, they must, for all the purposes of the action, be taken as true. They do not fall within the scope of any of the enumerated exceptions.

The Ohio statutes were thus before the Campbell County Chancery Court, and were also before the Kentucky Court of Appeals; and, by the Code of Civil Practice, these statutes were admitted to be genuine, accurate, and complete.

## FIFTH.

The only other point to be considered is the motion to affirm.

It is claimed that the writ of error in this case was filed in this court simply for delay, and that, in the lan-

guage of the brief filed by defendants in error, "it could be decided but one way when the final hearing is reached."

This last statement is probably true, but "the way" does not lie in the direction which opposite counsel seem to wish. If the case is to be considered upon its merits, we certainly desire to be heard upon the questions involved. Enough has been said in the early part of this argument to show that the decision of the Court of Appeals was erroneous, if the statutes of Ohio and the decisions of the Ohio courts are to govern the case, and this should be conclusive of this branch of the motion.

However, it would not be difficult to show that the learned court below was in error in supposing that the principles of the common law favored a preferment of one creditor by a failing debtor to the exclusion of others.

"The principles of the common law did not favor the preferment of creditors by a failing debtor. See Smith's Manual of Common Law, 381, 382."

*Atkinson* v. *Denby*, 7 Hurl. & Norm. 933.
*Dangelsh* v. *Tennent*, 2 Law Rep. Q. B. 50.

"The idea of preference of creditors was recognized as a fraud upon those not preferred."

"New devices, new forms of preferring creditors, have been found contrary to the spirit and purpose of our statutes. Can not we invoke the aid of the principles of the common law in preventing this mischief? Can not we draw from the fountain of justice, and find principles of natural justice?"

Weekly Law Bulletin (Ohio), vol. 22, p. 163.

The case of *Preston* v. *Spaulding*, 120 Ill. 208, is a leading case upon this subject. This presented a state of facts growing out of the action of the members of an insolvent firm, who, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives on alleged

debts. After these conveyances, and with full knowledge of impending failure, it was determined that the members of the firm should make a voluntary assignment, but that preferences should be given to certain creditors by executing to them what are called judgment notes. The case is very fully considered, and in the course of the opinion it is said:

"It will be observed that all this was strictly in accordance with the forms of law, but will any one deny that a most palpable fraud was, in fact, perpetrated upon appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? . . . This voluntary assignment act is in its character remedial, and must, therefore, be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and whatever obstacles might be encountered in other courts of this state, . . . . a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside."

See also *Miner's National Bank's Appeal*, 25 Penn. St. 193, 199.

*Winner* v. *Hoyt*, 66 Wis. 227, 239.

*Wilks* v. *Walker*, 22 So. Car. 108, 111.

This Illinois case was quoted and considered at length in *White* v. *Cotzhausen*, 129 U. S. 239. In the opinion of the court, rendered by Mr. Justice Harlan, on p. 341, appears the following:

"We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed 'largely and beneficially, so as to suppress the mischief and advance the remedy.' That court said, in *Chicago, etc., Railroad* v. *Dunn*, 52 Illi-

nois, 260, 263: 'The rule in construing remedial statutes, though it may be in derogation of the common law, is, that every thing is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.'"

The highest court in Ohio has repeatedly declared its approval of the principle for which we contend, and has set its seal thereon in the decisions cited, which appear on p. 14 of this brief. This court has also set the seal of its approval upon the principle claimed by us in the case last cited. We have no fear that a new departure will now be taken at the request of Mathews, who, with great effrontery, asks to have the statutes of a sovereign state set aside and ignored, at her bidding; to have a premium put upon fraud and perfidy, that she may reap the reward of an unjust preference.

Respectfully submitted,

H. P. LLOYD,
C. L. RAISON, JR.

## ASSIGNMENT OF ERRORS.

1. The Court of Appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the State of Ohio which were presented in the pleadings, in failing to give full faith and credit to the judicial construction of such laws by the highest court of said state, and in failing to give full faith and credit to the judicial proceedings of the Probate Court of Hamilton County, Ohio, as set forth in the pleadings.

2. The Court of Appeals of Kentucky erred in reversing the decision of the Chancery Court of Campbell County, Kentucky, in favor of Lloyd, trustee.

3. The Court of Appeals of Kentucky erred in holding that the question involved was governed by the common law, and not by the statute law of Ohio, where the parties to this action resided and where the transaction occurred.

4. The Court of Appeals erred in holding that section 6343 of the Rev. Stat. of Ohio was not applicable to this case, and in holding that no trust relation existed between the defendants Otten & Mathews.

# Supreme Court of the United States,

## OCTOBER TERM, 1893.

**Term No. 377.**

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HARLAN P. LLOYD, Assignee of E. L. Harper,

*Plaintiff in Error,*

*vs.*

HATTIE A. MATHEWS and J. H. OTTEN,

*Defendants in Error.*

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**IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.**

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This cause comes into this court on a writ of error issued to the Court of Appeals of the State of Kentucky. After the allowance of the writ of error, a Motion was filed by defendants to dismiss the case for want of jurisdiction. This motion was set for hearing April 25, 1892, and the court, after due consideration, reserved the decision of the Motion until the final hearing of the case. The point presented by the Motion is so closely connected with the merits of the case that it will be considered in the general argument.

### FIRST.

*Statement of the Case.*

The following statement of facts will be of service to the court:

On the 21st day of June, 1887, Edward L. Harper was, and for several years previously had been, a citizen and resident of the city of Cincinnati and State of Ohio. He was en-

gaged in the iron commission business, and was also doing an extensive business in his individual name as E. L. Harper. For some years prior to 1887, he had been largely engaged in speculations, and in 1887 was engaged in an enormous wheat gambling transaction in the city of Chicago, the result of which was very disastrous to him financially, was fatally disastrous to the bank of which he was manager, to the iron and steel works of which he was president, and to the business firms with which he was connected. The bank, the steel works, the business firm, and the individual, all were insolvent, and the failure of all these followed as the result of Harper's heavy losses in wheat gambling. The comptroller of the currency closed the bank on the 21st day of June, 1887, and the steel works, the firm of E. L. Harper & Co., and E. L. Harper, individually, executed and filed in court their assignments upon the same day.

The testimony of A. P. Gahr, which forms a part of the record, page 32, shows that Harper was hopelessly insolvent for some time prior to June 21, 1887, and that, as early as June 16, 1887, he had told his confidential clerk (Gahr) that he, Harper, was a ruined man, and that a general assignment by him, for the benefit of his creditors, was only a question of hours or days at the most. In the forenoon of June 21, 1887, at Cincinnati, Harper made a general assignment of his individual assets, for the equal benefit of all his creditors, under the general insolvent law of the State of Ohio. This deed of assignment was immediately placed upon record in the Probate Court of Hamilton county, Ohio, of which state and county Harper then was, and still is, a resident. All the proceedings in relation to this assignment were perfectly regular, and according to the law of the state. The assignee named in the deed failed to qualify by filing the requisite bond, and thereafter resigned the position of assignee: whereupon in accordance with the statute of Ohio, in such case made and provided, a trustee was appoint-

ed under the said deed of assignment, to take possession of all the assets for the benefit of the creditors, and with all the powers and duties of the original assignee. Lloyd, as such trustee, is the plaintiff in error in this action.

Hattie A. Mathews is a sister-in-law of E. L. Harper, and had been for a long time an inmate of Harper's family in Cincinnati, Ohio; she was such inmate at the date of Harper's assignment, and was a citizen and resident of Ohio on the 21st day of June, 1887. (*See Record pages 4, 6.*)

On this said date, Harper, individually, owned twenty shares in the Fidelity Loan and Building Association of Newport, Ky., which ownership was evidenced by a certain pass-book issued by the association, and which was at that time in Harper's possession. The value of these twenty shares amounted to $4,919.89.

On or before the 16th day of June, 1887, E. L. Harper, with full knowledge of his insolvency, had determined in his own mind to make a general assignment for the benefit of his creditors. (*See Gahr's testimony, Record page 32.*) With this determination and intent fully formed, a few days thereafter, to-wit: On the 21st day of June, 1887, being the same day of his assignment, E. L. Harper took the pass book issued by said building association, and formally in writing transferred and assigned to the defendant, John H. Otten, as trustee for Hattie A. Mathews, the said twenty shares in the said association, and delivered the book and written transfer to Otten, trustee, with instructions to collect the money from the association, and to pay it over to Hattie A. Mathews, as beneficiary of the trust. Otten, as such trustee, was unable to obtain the money from the building association, because Harper's assignment had taken place on the same day, and the officers of the association had good reason to believe that this attempted transfer was void, and that the money belonged to Harper's individual assignee, under the laws of the State of

Ohio. These officers therefore properly refused payment to Otten. (*See Otten's Testimony, Record page 28.*)

A few days later certain depositors of the Fidelity National Bank brought suits in the Campbell County, Kentucky, Chancery Court, against E. L. Harper, alleging that they were depositors, and that they had a right to collect the amounts of their deposits from the individual property of E. L. Harper in the State of Kentucky. They obtained attachments from the Campbell Chancery Court, and had the attachments served upon the building association aforesaid, seeking thus to hold the twenty shares of stock belonging to Harper for the payment of their respective deposits in the Fidelity National Bank. Learning of these suits, Lloyd, trustee, proceeded to defend his trust, as he was bound to do, in the Campbell County Chancery Court of Kentucky. He was made a party to the proceeding, filed a plea, in which he set up at length all of the facts in the case and especially the assignment of Harper on the 21st of June, 1887, under the insolvent law of the State of Ohio, the judicial proceedings in the Probate Court of Hamilton County, Ohio, the fact that Harper and Hattie A. Mathews were both residents of the State of Ohio on the said 21st day of June; he also alleged his regular appointment as trustee, and his claim, as such trustee, to the proceeds of the twenty shares of stock in the Fidelity Building Association of Newport, and denied all the claims in the various petitions of the plaintiffs. He also filed an exemplification of the record of proceedings in the Probate Court of Hamilton Co. Ohio.

At a later date the said John H. Otten, trustee for Mathews, and Hattie A. Mathews, beneficiary of the trust, were made parties defendant in the actions, which were thereupon consolidated, and the petition of Otten, trustee, and of Mathews, was filed in the Chancery Court as a cross-petition against Lloyd, trustee of E. L. Harper. See Record page 2, folio 3, one paragraph of which is as follows, viz:

" Petitioners say that on the day the said deed of assignment was made and executed in the State of Ohio, to wit, on the 21st day of June, 1887, several hours before the execution of said deed of assignment, the said E. L. Harper, defendant, executed and delivered in writing to the petitioner J. H. Otten, all the said 20 shares of stock of said building association, with directions to him, the said J. H. Otten, to collect the proceeds of the said stock and pay the same to the petitioner Hattie A. Mathews."

To this cross-petition, Lloyd, trustee, filed an answer, repeating, so far as was necessary, the averments in his first petition, setting out in detail Harper's insolvency for a considerable time prior to the execution and filing of his deed of assignment, alleging Harper's design to prefer Mathews, through the medium of a trustee, to his other creditors, in violation of the statute law of the State of Ohio; also, the fact that Otten, trustee, and Mathews, had knowledge of Harper's insolvency, and that in making this fraudulent preference, Harper had in contemplation his own insolvency and the making of a deed of general assignment.

Lloyd, trustee, also set forth in full the judicial proceedings in the Probate Court of Hamilton County, Ohio, alleging the force and effect thereof, and the faith and credit to be given them, and his claim under the insolvency proceedings in said court, in accordance with U. S. Constitution Art. 4, Section 1.

Lloyd, trustee, in this pleading also set up in full, Sec. 6343 of the Rev. Stat. of Ohio, found in Smith & Benedict's edition of the Statutes of Ohio, 1890, Ch. 4, Title. 2, relating to insolvent debtors, and the section was fully set forth *in haec verba:*

"Sec. 6343. (*Assignments in contemplation of insolvency to inure to the benefit of all the creditors.*)

"All assignments in trust, to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal bene-

fit of all creditors in proportion to the amount of their respective claims; and the trusts arising under the same shall be administered in conformity with the provision of this chapter." (V. 56, p. 231, sec. 13, S. & C. 712.) (*See Record pages 5, 6, and 7.*)

In the same pleading, Lloyd, trustee, also set up Sec. 4196 of the Rev. Stat. of Ohio, Smith & Benedict's edition, 1890, Tit. 4, Ch. 4, and alleged that under this section of the Ohio Statutes, the attempted transfer of the shares by Harper to Otten, trustee, was fraudulent and void. The pleading showed the section *in haec verba* as follows:

"Sec. 4196. (*Gifts, grants, etc., to defraud creditors void.*)
"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." (29 v. 218, sec. 2; S. & C. 959.) (*See Record page 6.*)

No reply was made by either of the defendants to these pleadings and these allegations as to the Ohio statutes, and as to the effect thereof, were thus taken to be true by the rules of practice in the Kentucky Chancery Court, and the sections of the Revised Statutes of Ohio, and the effect thereof, were admitted as alleged, and were admitted to be fully and properly set forth in the pleadings. The only further pleading filed by the defendants Mathews or Otten, trustee, was a brief one, in which Mathews expressly admitted that E. L. Harper intended by the attempted transfer of the said shares to prefer her by the medium of a trustee over his other creditors. (*See Record page 14.*)

Testimony was taken, and the whole case was submitted to the Chancery Court of Campbell County, whereupon the chancellor decided that the claims of Lloyd, trustee, were well founded; that the Statutes of Ohio, as

pleaded, must govern the case, and that the Ohio decisions, construing said statutes, should be followed, because the contesting parties were all residents of the State of Ohio, where the assignment took place, and where the entire transaction occurred. The cross-petition of Otten, trustee, and of Mathews was dismissed, and a decree was rendered by the Chancery Court in favor of Lloyd, trustee, for the full value of the said twenty shares of stock in the said Fidelity Building Association. From this decision of the chancellor, Mathews and Otten, trustee, took an appeal to the Court of Appeals of Kentucky. (*See Record, pages 16, 17.*)

Under the Civil Code of Procedure in Kentucky, an appellant is not required to take up the entire pleadings and the entire testimony in the case, but may select, at his option, such portions as he deems important for his purpose, and leave the remainder of the pleadings and evidence in the court below. The appellee is summoned to the Court of Appeals; and, without an opportunity to see the brief or to hear the argument of his adversary, is compelled to make good his own position upon the record, however imperfect that record may be, and however meager the knowledge afforded to the reviewing court by such defective record.

In the case at bar, Mathews, appellant from the Chancery Court of Campbell County, did not take to the Court of Appeals the pleading first filed by Lloyd, trustee, in this action, nor did she take to the Appellate Court the testimony showing the proceedings of the Probate Court of Hamilton County, Ohio, which were duly authenticated according to the act of congress, nor the Ohio statutes and decisions which were before the Chancery Court of Campbell County, Kentucky, on the submission of the case. But as all of these material allegations, and the testimony in support of them, were deemed to be admitted by the failure of Mathews to deny or controvert them, and as there

was no denial of the statute law of Ohio, as pleaded, or of the Ohio decisions or the proceedings of the Ohio courts, argument was made and heard in the Court of Appeals of Kentucky, as if the entire record had been before it.

The decision of the Chancery Court was based upon the construction of the statutes and decisions of the Ohio courts, and was properly in favor of Lloyd, trustee of E. L. Harper. The Court of Appeals of Kentucky, as a reviewing court, reviewing the questions of law, necessarily construed the same statutes and decisions of Ohio, and gave its opinion adverse to the force and construction of the Ohio statutes, which had been given to them theretofore by the courts of Ohio. The erroneous decision of the Court of Appeals, in refusing to give to the probate proceedings in Ohio, to the statutes of Ohio, and to the decisions of the Ohio Courts upon such statutes, the force and effect set up and asserted by Lloyd, trustee, was excepted to at the time; and, in accordance with the Code of Civil Procedure of the State of Kentucky, a petition for rehearing was filed in the said Court of Appeals. A decision of the Court of Appeals was rendered upon this petition for rehearing and the opinion is found upon pp. 54, 55, and 56 of the printed record. It there appears that the final decision of the Court of Appeals was adverse to the claim of Lloyd, trustee upon a federal question clearly presented, and we claim the right to have it reviewed by this court.

## SECOND.

### *Argument.*

*First.*—It is evident that the first point to be decided is, Does this case present a federal question?

*A.* It does not seem necessary to make an extended argument upon this point. The article of the federal constitution, under which we claim, the frequent decisions of

this court thereon, and the principles governing this entire class of cases, are all so familiar to this court that the argument may be made very briefly.

*B.* The record shows (page 4) that all the parties to this case were residents of the State of Ohio, that the entire transactions took place within the limits of that state in accordance with the laws thereof; and this being so, the Ohio statutes operated as immediately and as effectively upon Otten, trustee, and upon Mathews, as upon any other of the numerous creditors of E. L. Harper.

*C.* The court will also observe that this case does not call into action the rule of comity, which sometimes prevails where the litigants are inhabitants of different states; for instance, if Mathews had been a resident of the State of Kentucky, she might have invoked the jurisdiction of the Kentucky courts to protect her against the assumption on the part of a foreign assignee, and have claimed that the comity which prevails between states does not require the rights of a citizen of Kentucky to be impaired by reason of any statute law of Ohio or any judicial proceedings under said law, as the jurisdiction of the Ohio courts would necessarily be bounded by the territorial limits of the state.

*D.* On the contrary, Lloyd, trustee, went into the State of Kentucky on an equal footing with Mathews in every respect, and stood in a position to claim all the protection, rights, and immunities and privileges which Mathews could claim. There was no reason why the Court of Appeals should ignore the Ohio law and the Ohio decisions, and give Mathews a judgment to which she was not entitled, and which she never could have obtained in the State of Ohio. There was every reason why that court should have considered the whole case under the Ohio statutes and decisions, and should have given full faith and credit to them.

*E.* The learned court seems to have fallen into an

error, and in the opinion rendered to have made statements irreconcilable with each other.

On page 55 of the printed record, the Court of Appeals said:

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity therefore is to be decided by the law in force there. . . . The appellee has, in his pleading, set out a section of the Ohio statutes, which reads thus: 'All assignments in trust to a trustee or trustees made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors,'" etc.

And, again, upon page 56 of the record, the same court said:

"The rules of the common law govern the transaction."

*F.* These statements appear to be contradictory to each other, but, be that as it may, the learned court proceeded to consider the claim made by Lloyd, trustee, under this section 6343 of the Revised Statutes of Ohio, and decided against the validity of the claim and against the application of the Ohio statutes, saying, on page 56 of the record:

"It does not appear to us, however, to embrace a case like this one, but relates alone to the preferences made in deeds of assignments to trustees for creditors generally."

This was an obvious error on the part of the Court of Appeals, and is a plain misapprehension of the statute, which refers directly to assignments made in trust to a trustee, with intent to prefer one or more creditors, and declares that such trust shall inure to the equal benefit of all creditors.

The Supreme Court of Ohio had considered this statute in *Harkrader et al.* v. *Leiby et al.*, 4 *Ohio State Rep.* 602, and we give two clauses of the syllabus:

"L, an insolvent debtor, and in contemplation of such insolvency, made a conveyance by mortgage to three per-

sons, conditioned to be void, if he should save them harmless upon certain indorsements made by them for his benefit to divers persons, and should also pay to certain others of his creditors the certain sums of money owing by him to them. *Held*:

"1. That such conveyance is, in substance and legal effect, an assignment within the purview of the act of 1838, relating to assignments by insolvent debtors to trustees, with the design to prefer one or more creditors to the exclusion of others, and by the force of that act is made to inure to the benefit of all creditors in proportion to their respective demands."

"5. Where such interest is received by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of *all* his creditors, and distributes the fund to all, in proportion to their respective demands."

See also *Commercial Bank* v. *Cincinnati Bank*, 3 Ohio Circuit Court Reports, page 513.

This act of 1838, of the Ohio laws, has been already quoted in this brief, and is the same law which was set forth in full in the original pleading filed by Lloyd, trustee, (*See Record page* 7,) and was the act in force in Ohio, on the 21st day of June, 1887, when E. L. Harper attempted to make this fraudulent preference, through the medium of a trustee, for the benefit of Mathews, and on the day when he made his general assignment for the benefit of all his creditors.

In the case at bar there was an attempt to assign, through the medium of a trustee, twenty shares of stock, and thereby to prefer one of the creditors to the exclusion of all others. This was made in contemplation of insolvency, and the overt act of making a general assignment, followed immediately thereafter. Every element necessary to render operative and effective this provision of the Ohio statute was present, and the decisions show that the object of the statute was to reach cases like the one at bar.

*Hull* v. *Jeffery*, 8 Ohio, 391, 392.
*Bloom* v. *Noggle*, 4 Ohio St. 56, 57.
*Dickson* v. *Rawson*, 5 Ohio St. 224.
*Williams* v. *Englebrecht*, 37 Ohio St. 386.
*Hitesman* v. *Donnel*, 40 Ohio St. 294.

In *Dickson* v. *Rawson*, 5 O. St. 218, on page 222 of the opinion, the court uses the following language:

"To bring the case within the operation of the statute, the conveyance must be in trust, and the person receiving the property is thereby constituted a trustee for some one or more of the creditors of the debtor, to the exclusion of others. Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether, by the terms of the instrument or by necessary implication, he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it.

*If a court of chancery, at the instance of the creditor, would compel him thus to account, the character of the transfer and his own position are thereby determined; and the statute then steps in and enlarges the trust, and makes it inure to the benefit of all creditors, and distributes the fund to all in proportion to their respective demands.*"

*See Record page* 2, *Folio* 3.

These decisions of the Supreme Court of Ohio show the rule of construction adopted by the highest court of that state in construing its own statutes, and bring the case at bar directly within the scope and operation of those decisions.

In a leading case in this court,

*Leffingwell* v. *Warren*, 2 Black, page 599, Mr. Justice Swayne delivered the opinion of the court, and used the following words:

"The construction given to a statute of a state by the highest judicial tribunal in said state, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

And he cites as authority for this decision a large number of cases decided in this court.

In the case of

*Provident Institution* v. *Massachusetts*, 6 Wall. page 611, this question was considered, and Mr. Justice Clifford, speaking for the court, said:

"Federal Courts and State Courts, it may also be remarked, exercise concurrent jurisdiction in a large class of cases. . . . . But the decision of this court, in cases involving Federal questions, are conclusive authorities in the State courts, and their decisions, upon the construction of their own constitution and local laws, are equally so in this court, unless the case be one which presents some question arising under the 25th section of the Judiciary Act."

No such question, arising under the 25th section, was involved in the decisions by the Supreme Court of Ohio, and "therefore, they must be regarded as conclusive authorities," and the Court of Appeals of Kentucky should have followed them.

Justice Clifford adds further:

"Decisions of the State courts, rendered since that time, are to the same effect, and there is nothing in the decisions of this court, in any respect, inconsistent with that rule."

(*See pp.* 623, 629.)

"This construction of the highest court of a state, not called in question by any conflicting decisions in that state, is conclusive upon us."

*Randall* v. *Brigham*, 7 Wall. 523, 541.

"This court is bound to assume, that decisions of state courts, on matters of state law, have been made after thorough consideration, and that they embody the deliberate judgment of the Court."

*Cross* v. *Allen*, 141 U. S. page 528, last clause of the syllabus.

Mr. Justice Field, speaking for this Court in *Christie* v. *Pridgeon*, 4 Wall. 196, 203, says:

"The interpretation within the jurisdiction of one state, becomes a part of the law of that state, as much so as if incorporated in the body of it by the legislature."

It would be easy to multiply citations confirming the rule as stated above. But a case which arose in the State of Colorado, has recently had full consideration in this Court, with especial reference to the subject of assignments, and the question of the construction and effect of the statute of the State regulating assignments.

*May* v. *Tenney*, 148 U. S. page 60.

There is in this case an exhaustive review of the Federal authorities upon the subject of the construction of the statutes of the states in regard to assignments for the benefit of creditors, and it would be hardly possible to add anything more to the opinion rendered in that case. The language of the Court is:

"The question of the construction and effect of the statute of a state regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, showing the rule of property, are of controlling authority in the Courts of the United States"

See also, *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223.

*II.* Ignoring these Ohio decisions, and misconstruing the statute, the Court of Appeals decided adversely to the claim of Lloyd, trustee, and, later in the opinion, added these words:

"The transfer was, in fact made, it was not fraudulent, nor as a preference was it forbidden by the *lex loci*, and it must be upheld."

This denial by the court, to Lloyd, trustee, of his express rights under the Ohio statutes, and decisions, presents a federal question, and justifies the issuance of the writ of error by this court.

In *Green* v. *Van Buskirk*, 5 Wallace, 307, it was held:

"The refusal of the state court, in which suit may be tried to give to the proceedings of the court, under which the property was sold, the same effect in their operation upon the title, as they have by law and usage in the state where they took place, constitutes a proper case for review in this court, under the twenty-fifth section of the Judiciary Act."

The motion to dismiss was therefore overruled, and the case was retained by this court for hearing upon the merits. The case came on for final hearing at the October term, 1868. It is reported in 7 Wallace, 139. We quote from the syllabus as follows:

"Held by this court, that by such judgment the full faith and credit required by the federal constitution had not been given in the State of New York to the judicial proceedings of the State of Illinois, and that so the judgment below was erroneous."

This opinion was delivered by Mr. Justice Davis, and was concurred in by all the members of the court. The judgment of the Supreme Court of the State of New York was reversed, and the cause was remitted to that court with instructions to enter judgment for the plaintiffs in error.

In the case at bar, it is evident that neither the lower court nor the Court of Appeals could have rendered the opinions, parts of which are above cited, unless they had passed directly upon the Ohio statutes, and that the consideration and construction of these statutes formed an essential part of the opinion rendered by the lower court and by the Court of Appeals. The writ of error, therefore, can not be dismissed, and the decision of the Court of Appeals must be reversed.

*Second.* The deed of assignment from Harper, under which Lloyd, trustee, claims, was filed and recorded in the Probate Court of Hamilton County, Ohio, and regular judicial proceedings were had in said court, according to the

statute in such case made and provided. A certified copy of this assignment and of all the proceedings of the Probate Court thereunder, duly authenticated according to the act of congress for use in another state, was presented in the Chancery Court of Campbell County, Kentucky, being the court of first resort. The statutes of Ohio relating to this matter were also before the said Chancery Court, and the chancellor passed upon all these records, and gave proper faith and credit to them, sustaining the validity of the proceedings in the Ohio court under the Ohio law. When Mathews appealed from the decree thus rendered in the court below to the Court of Appeals of Kentucky, the issue presented in the higher court was necessarily an issue raised upon the claim presented by Lloyd, trustee, under the proceedings of the Probate Court of Hamilton County, Ohio. He claimed in the Chancery Court, and he claimed in the Court of Appeals, that these proceedings should have the same faith and credit in Kentucky as by law and by usage they would have had if the controversy had taken place in the courts of Ohio. The refusal of the Court of Appeals of Kentucky to give these proceedings their proper force and effect was a denial of the constitutional rights of Lloyd, trustee, and entitled him to have the judgment reviewed by the Supreme Court of the United States.

In the case of *Crapo* v. *Kelley*, 16 Wallace, 610, where a question was raised as to the jurisdiction of the Supreme Court to review a decision of a New York court, it was held.

"That the New York court necessarily decided what effect the insolvency proceedings in Massachusets had by the law and usage in that state, and that, as it decided against the effect which the defendant set up for them, this court has jurisdiction to review the judgment of the New York court."

See also *Cole* v. *Cunningham*, 133 U. S. 107.

The Court of Appeals of Kentucky was necessarily

compelled to pass and did pass upon the question as to the effect of the insolvency proceedings in Ohio, and its decision was against the effect which Lloyd, trustee, set up and claimed for them. It has long been settled in this court, that whenever a question or issue, which makes a federal question, is so presented by the pleadings that the court must necessarily pass upon it in deciding the case, that then the federal question is raised in the case in such a manner as to justify a review by this court of the judgment of the state court.

*Victory*, 6 Wall. 382.

*Murdock* v. *The City of Memphis*, 20 Wall. 591.

In this case the court said on page 591.

"2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of federal law must control the whole case, or that there has been no decision by the state court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the state court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require."

*See also Chouteau* v. *Gibson*, 111 U. S. 200.

We are clearly entitled to have the questions on this branch of the case, and which were presented in the original pleading filed in the Chancery Court, and which were

supported by proper proof in the record duly authenticated according to the act of congress, reviewed by this court.

The recent case of *Smith's Middlings Purifier Co.* v. *McGroarty*, reported in 136 U. S., page 237, reviews the Ohio statutes in regard to the filing of a voluntary assignment for the benefit of creditors, and the statutes relating to insolvency. Although one of the parties to the suit was a citizen of the state of New York, this court held (page 241); Mr. Justice Gray speaking for the court,

"The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and admitted by the demurrer, and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio."

We respectfully claim that the application of this principle is conclusive in favor of the plaintiff in error on the pending action.

## THIRD.

*First.* Coming now briefly to examine the points made by counsel for appellee, in the brief filed with the motion, let us first examine the general statutes of Kentucky and the rules of practice of her courts applicable to a case of this character. This will greatly facilitate the determination of the question involved. See General Statutes of Kentucky, chapter 28, art. 2, sec. 10, found on page 346, as follows (referring to the Court of Appeals):

"The decisions of the court must be so written as to show the governing principle thereof, except in cases involving matters of fact only. The court must deliver written opinions in all cases."

See also, Civil Code of Practice of Kentucky, Carroll's edition, 1888, title 18, chap. 3, sec. 760, p. 341:

"Sec. 760. *The court may make rules when mandate*

*shall issue.* 1. The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases and motions, and the manner and time of presenting motions or petitions for rehearing therein, and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same; provided that no mandate shall issue, nor decision become final until after 30 days, including Sundays, from the day on which the decision is rendered, unless the case, in appeal cases, otherwise direct; and if said 30 days expire during the vacation or recess of the court, a written order of one of its judges filed in its clerk's office within said 30 days, shall have the same effect to suspend a mandate, by allowing a petition for rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court."

Under the authority thus granted by the legislature, the Court of Appeals of Kentucky, on the 15th of March, 1884, adopted Rule 19, which is duly entered upon the record and is published annually for the information of all litigants:

"Petitions for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the court, or that a decision is in conflict with a statute, or with a controlling decision, to which the attention of the court was not drawn, through neglect or inadvertence of counsel. Any petition violative of this rule will not be presented to be filed, and if filed, will be stricken from the record."

Rule 20, adopted June 16, 1887, is as follows:

"Ordered, that where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges."

From the statute it appears that, in Kentucky, no decision can become final until after the expiration of thirty days from the day on which the decision is rendered; and it

is further provided that no mandate shall issue during that time. No decree can be rendered by the Court of Appeals until its final decision; and the rules provide that the petition for rehearing, to be filed at any time before the decision becomes final, must clearly show from the record that some question duly submitted by counsel and decisive of the case, has been overlooked by the court.

The record in this case shows that within the proper time after the first decision by the Court of Appeals, Lloyd, trustee, filed his petition for rehearing, setting forth exactly the ground contemplated by Rule 19, and *in that petition it was clearly shown that this federal question had been duly submitted in the original trial court, that it had been duly submitted by counsel in the Court of Appeals, that it was decisive of the case,* and that *it had been overlooked by the court. See Record pages 37-48.*

Plaintiff in error was thus brought within the direct and explicit provisions of the Civil Code of Practice of Kentucky, and within the scope of the rules of the Court of Appeals, framed in pursuance therewith. The federal question had been presented in the lower court, and was pre. sented in the Appellate Court. The statement by counsel for defendant in error, in the printed brief, that the federal question was first presented in the petition for rehearing, is erroneous. (*See Record page* 7.) But, even if it had been there first presented, it would still be in time, as no final decision and no final decree had then been rendered in the case. The entire conduct of the plaintiff in error in the Court of Appeals was perfectly regular and in strict accordance with the Code of Civil Practice of that state. If any decision in other states has been rendered in apparent conflict with this position, it has been in states where the civil practice was essentially different from that in force in the State of Kentucky.

It is probably unnecessary to cite the Kentucky decis-

ions in support of these statements, but the following case may be examined.

"A petition for a rehearing suspends the judgment of the Court of Appeals until the petition is disposed of at the same or a future term, without an express order of suspension."

*Turner* v. *Booker*, 2 Dana (Ky.) 335.

From what has been said in argument thus far, it is clearly apparent:

1. That the Federal question was fairly presented for decision by the State Court.

2. That its decision was necessary to a determination of the case.

3. That it was decided adversely to the party claiming the right under the federal laws or constitution.

4. That the judgment as rendered, could not have been given by the Court of Appeals of Kentucky, without deciding this federal question.

This brings the case clearly within the jurisdiction of this court, as recently declared by this court in

*Eustis* v. *Bolles*, 150 U. S. 362.

This is entirely independent of what the ruling of the lower court may have been on the first hearing of this case, because our appeal lies to the Court of Appeals of Kentucky, and we are asking a reversal of the decision of that court. Upon this point, a recent decision of this court is applicable,

"According to the law and practice of Louisiana, the Supreme Court of that State, in cases brought before it by appeal from the inferior courts, determines the matter in controversy, as presented by the record, both as to fact and law, without regard to the particular rulings of the courts below, and its opinion, showing the grounds of its judgment, constitutes part of the record to be reviewed in this court, upon writ of error, when the question for determination is whether the Supreme Court of the state decided a federal question, necessary to the decision of the case, without respect to the rulings of the inferior state court."

*Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141.

*Second.* It is said by defendants in error that the decision of the Court of Appeals was founded upon principles of general law, as administered by the courts of this country.

There is a clause in the opinion to the effect that the principles of the common law must prevail, but this statement is made only after an examination of the Ohio statutes, and after a construction had been put upon them adverse to the decisions in Ohio, and adverse to the claims made by Lloyd, trustee. In other words, the federal question was first passed upon by the Court of Appeals, and was decided adversely to the claimant, the prescnt plaintiff in error. This, in apparent contradiction of its previous statement, that

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there."

Later in the opinion, the court state as follows:

"The rules of the common law govern the transaction, and when so considered is not invalid."

(*See page* 54 *of the Record.*)

It thus appears that the principles of general law were not thought of or considered until the federal question had been previously determined.

*Third.* It is also said, in the brief filed by defendants in error:

"No issue is raised in the pleading as to the correctness of the quotation from the Ohio statutes by the plaintiff in error."

The Ohio statutes were set forth in full in the pleading filed by Lloyd, trustee, in the Chancery Court of Campbell County. These statutes have been before every tribunal in which this case has hitherto been heard. They are before this court. Plaintiff in error has never waived his rights nor failed to assert them.

In the Civil Code of Practice of Kentucky, Carroll's Ed., 1888, Title 7, ch. 7, sec. 126, is found the following:

"Every material allegation of a pleading must, for the purpose of the action, be taken as true, unless specifically traversed, excepting these, which must be proved though not traversed;"

1. Allegations of a petition or cross-petition against a defendant who is under any disability except coverture.

2. Allegations of an answer or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

3. Allegations against a defendant, constructively summoned, who has not appeared in the action.

4. Allegations concerning value or amount of damage, not accompanied by the allegations of an express promise, or by statements of facts showing implied promise to pay said value or damage, such allegations so accompanied need not be proved unless traversed.

Sec. 127. A material allegation is one which is necessary for the statement or support of a cause of action or defense."

It will thus be seen that when the Ohio statutes were fully set forth and pleaded in *haec verba*, and when, by the admission of opposite counsel and otherwise, it appears that no issue was made as to the existence or the force and effect of these statutes, it was not necessary to introduce proof to substantiate these averments. These were material allegations, and by the precise language of the Kentucky statute, they must, for all the purposes of the action, be taken as true. They do not fall within the scope of any of the enumerated exceptions.

The Ohio statutes were thus before the Campbell Co. Chancery Court, and were also before the Kentucky Court of Appeals; and by the Code of Civil Practice, these statutes were admitted to be genuine, accurate and complete.

## FOURTH.

Let us look for a moment at the testimony.

On page 19 of the printed record, Miss Hattie A.

Mathews gives a remarkable statement, questions 9 to 16 inclusive, saying that she received $1,000 from her mother's estate, in November or December, 1880, which sum, in folio 36, she says she loaned to Harper at 8 per cent. interest, and that, between that period and August 8, 1881, this sum had grown to $5,000. But, in answer to question 22, on page 20, she says that she never had this $5,000 in her possession; and, from her further testimony it appears that she knew very little about it, and it may have been a purely imaginary sum.

She further testifies, see folio 23 on page 20, that she received no shares of the stock of the building association, either before or after Harper's assignment, and that she never saw the pass-book of the building association until she saw it in the attorney's office, where her deposition was being taken, on the 16th of April, 1888.

Further light is thrown upon this transaction by the testimony of J. H. Otten, on pages 28, 29 and 30 of the printed record. J. H. Otten, who was the trustee named in the fraudulent preference, says, on page 28 of the record, that he took the pass-book of the building association and went to the Fidelity Bank in Cincinnati, Ohio, and was refused admission.

"*Q.* 6. What did you go to the Fidelity National Bank for?"

"*A.* I went there to get Mr. Harper's signature to the transfer of the 20 shares in the Fidelity Building Association to me."

"*Q.* 9. For whom did you receive this assignment of stock?"

"*A.* Miss Hattie Mathews."

"Cross-Examination. *Q.* 6. What did you give Mr. Harper, or any one for him, in consideration of the transfer of the 20 shares of stock in the building association by him to you, if any?"

"*A.* Not a cent."

"*Q.* 7. What interest, if any, did you have, or do

you now have, in the 20 shares of stock transferred to you by Mr. Harper?"

"*A.* None for myself personally, except as protector for Miss Mathews."

"*Q.* 8. Has there ever been any transfer made by you to Miss Mathews, or any one else, of the 20 shares of stock transferred to you by Mr. Harper, and is the same now in your name?"

"*A.* The same is now in my name, and there has never been no transfer made to her."

In answer to question 10, Otten states that:-

"I also told the secretary, Ed. Morris, both, that not a dollar of it belonged to me, that I was acting for Miss Mathews."

On page 32 of the record, the witness, A. P. Gahr, on cross-examination, in answer to question 3, said:

"Mr. Harper told me, about 9 A. M. on June 16th, 1887, that he was financially ruined, and that a general assignment was simply a question of hours, or of a few days at the most."

Taking this testimony, in connection with the allegations of the petition of Hattie A. Mathews and J. H. Otten, on page 2 of the record, which petition was sworn to by Hattie A. Mathews on the 28th day of December, 1887, the following extract from said petition becomes very significant:

"Several hours before the execution of said deed of assignment, the said E. L. Harper, defendant, executed and delivered, in writing, to the petitioner, J. H. Otten, all the said 20 shares of stock of said building association, with directions to him, the said J. H. Otten, to collect the proceeds of the said stock and pay the same to the petitioner, Hattie A. Mathews."

This allegation of the petition, in connection with the testimony quoted above of Hattie A. Mathews, beneficiary, of John H. Otten, the trustee for Mathews, and of A. P. Gahr, the confidential adviser, show conclusively that Otten occupied a trust relation for Hattie A. Mathews; that he

could have been compelled by law to account to her for the proceeds of the shares of the building association if he had collected them; and brings the case strictly within the scope of the provisions of Sec. 6343 of the Rev. Stat. of Ohio.

Otten held the legal title to the 20 shares, Hattie A. Mathews was the beneficial owner and the cestui que trust. It was in no sense an agency, for Hattie A. Mathews had nothing whatever to do with selecting the agent, and gave him no instructions. Harper selected the trustee, created the trust, and put in operation the machinery for its execution.

This disposes of the only point in the opinion of the learned Court of Appeals of Kentucky relating to the creation of the trust. Indeed, if we take the language of the learned court, in folio 98 on page 56, and folio 99 on page 59, we shall see into what a strained position the court was inadvertently drawn. On folio 98, the court say:

"Certainly, no such trust was created. . . . None was intended. Otten was not named as trustee for the appellant."

And in the next folio, the court admit our position in stating, in its own language:

"She (Hattie A. Mathews) is claiming to be the owner of the stock, and did become, at least, the equitable owner by the transfer to Otten, the legal title being in him."

Thus, it is clearly evident that the decision of the Court of Appeals cannot be sustained, even on its own basis of reasoning, and we are persuaded that, if that learned court had the opportunity, it would be glad to-day to correct its obvious and embarrassing error.

## FIFTH.

*First.* Enough has been said in the early part of this argument to show that the decision of the Court of Appeals was

erroneous, if the statutes of Ohio and the decisions of the Ohio courts are to govern the case, and this should be conclusive.

However, it would not be difficult to show that the learned court below was in error in supposing that the principles of the common law favored a preferment of one creditor by a failing debtor, to the exclusion of others.

"The principles of the common law did not favor the preferment of creditors by a failing debtor. See Smith's Manual of Common Law, 381, 382."

*Atkinson* v. *Denby*, 7 Hurl. & Norm. 933.
*Dangelsh* v. *Tennent*, 2 Law Rep. Q. B. 50.

"The idea of preference of creditors was recognized as a fraud upon those not preferred."

"New devices, new forms of preferring creditors, have been found contrary to the spirit and purpose of our statutes. Can not we invoke the aid of the principles of the common law in preventing this mischief? Can not we draw from the fountain of justice, and find the principles of natural justice?"

Weekly Law Bulletin (Ohio), vol. 22, page 163.

The case of *Preston* v. *Spaulding*, 120 Ill. 208, is a leading case upon this subject. This presented a state of facts growing out of the action of the members of an insolvent firm, who, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives on alleged debts. After these conveyances, and with full knowledge of impending failure, it was determined that the members of the firm should make a voluntary assignment, but that preferences should be given to certain creditors by executing to them what are called judgment notes. The case is very fully considered, and in the course of the opinion it is said:

"It will be observed that all this was strictly in accordance with the forms of law, but will any one deny that a most palpable fraud was, in fact, perpetrated upon the appellee, Spaulding, by the debtors, or that the acts of the debtors

were in fraud of the statute? . . . This voluntary assignment act is in its character remedial, and must, therefore, be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and whatever obstacles might be encountered in other courts of this state, . . . a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside."

See also *Miner's National Bank's Appeal*, 25 Penn. St. 193, 199.

*Winner* v. *Hoyt*, 66 Wis. 227, 239.

*Wilks* v. *Walker*, 22 So. Car. 108, 111.

This Illinois case was quoted and considered at length in *White* v. *Cotzhausen*, 129 U. S. 239. In the opinion of the court, rendered by Mr. Justice Harlan, on page 341, appears the following:

"We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed 'largely and beneficially, so as to suppress the mischief and advance the remedy.' That court said, in *Chicago etc., Railroad* v. *Dunn*, 52 Illinois, 260, 263: 'The rule in construing remedial statutes, though it may be in derogation of the common law, is that every thing is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.'"

*Second.* Be that as it may, if we bear in mind the principle established by the foregoing decisions, it is easy to see that the assignment from Harper to Otten, in trust for Mathews was a transfer in contravention of the statutes of Ohio, where all of the parties lived, and where the attempt to transfer was made. The character of this transaction is determined by the domicile of the parties and the law of that

domicile. It was an Ohio transaction, and the law of Ohio must govern.

This point has been carefully considered in the case of *Dickson* v. *Rawson*, 5 Ohio State, pp. 218 and 224, and the language of the court is:

"We are therefore of opinion, that the character and legal effect of such an assignment is determined at the time it is made and accepted, and is not changed by the fact that the property assigned turns out to be no more than sufficient to pay the assignees. If, at the time it is made and accepted, it subjects the assignees to account to any other creditor of the assignor, the assignment is in trust, and the assignees *trustees* within the meaning of the statute."

This decision of the Supreme Court of Ohio has stood unchallenged for nearly forty years, and, in connection with the statutes which were pleaded in the answer of Lloyd, trustee. have constituted the law of Ohio applicable to the entire class of cases within which the case at bar necessarily falls.

In this case, Harper chose Otten as trustee for Mathews. To Otten, as trustee, Harper assigned and transferred the said shares of the Fidelity Building Association, and Otten, trustee, would have been compelled by a court of chancery to account to Mathews, if he had so collected the money from the building association and had failed to pay it over. *See admission of Otten and Mathews on page 2 of Record.*

In confirmation of this argument, it is only necessary for us to refer to the latest decision of the Supreme Court of Ohio on this subject, *Pendery* v. *Allen*, which is found in the 50 Ohio State Reports page ——: and is also reported in 29 Weekly Law Bulletin (Ohio), pp. 251, 255.

This case was decided, Jan. 31, 1893, and there is no later decision of that court upon this subject. A reading of this case shows that the court very carefully examined and considered all of the cases in Ohio upon this general sub-

ject, and the conclusion of the court is expressed in the following words:

"Having gone beyond this, and accepted a mortgage intended to secure another creditor, he became by force of the statute a trustee for all and in respect to all the property covered by the mortgage; and his liability in this regard is to be determined, not by subsequent events, but by the nature of the transfer at the time it was made. If, by its terms or necessary implication, it made him liable to account to another creditor of the debtor, it is an assignment in trust within the meaning of the statute."

Affirming *Dickson* v. *Rawson*, 5 Ohio State, 218.

The highest court in Ohio has repeatedly declared its approval of the principle for which we contend, and has set its seal thereon in the decisions cited. This court has also set the seal of its approval upon the principle claimed by us in the case last cited. We have no fear that a new departure will now be taken at the request of Mathews, who asks to have the statutes and decisions of a sovereign state set aside and ignored at her bidding; that she may reap the reward of an unjust preference.

Respectfully submitted.

H. P. LLOYD,
C. L. RAISON, JR.
*Counsel for Appellant.*

Robert Clarke & Co., Printers.] [March, 1892.

Case No. 14,467.

# Supreme Court of the United States,

## OCTOBER TERM, 1891.

Term No. 1,014.

*H. P. Lloyd, Assignee of E. L. Harper,*
*Plaintiff in Error,*

*vs.*

*Hattie A. Mathews and J. H. Otten,*
*Defendants in Error.*

**IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.**

**Brief for Defendants in Error on motion to dismiss for want of jurisdiction, etc., April 25, 1892.**

CHAS. H. FISK,
JNO. S. DUCKER,
*Counsel for Defendants in Error.*

This is a motion of defendants in error to dismiss the writ for want of jurisdiction, under rule 6 of this court. Joined with it is a motion to affirm the judgment appealed from, because the writ of error is manifestly prosecuted for delay only.

For the purposes of this motion, defendants in error have had printed all the pleadings, and the opinion and judgment of the court below, which includes the entire

record except the depositions and some minor and unimportant orders.

## STATEMENT.

It appears from the pleadings and opinion, that in 1881 the defendant in error gave Mr. E. L. Harper some money to invest for her—which he did. The investments seemed to have been fortunate, for on the 8th of August, 1881, Mr. Harper gave the defendant a demand note for $5,000. Interest was paid on this note to January 1, 1882.

It appears further that Harper was the owner of some building association stock in Newport, Ky., of the value of about $5,000. On the 27th of June, 1887, he was insolvent. On the morning of that day he assigned this stock to the defendant in error, Hattie A. Mathews, in part payment of her debt. The transfer of the stock was made to J. H. Otten, with directions to collect for Miss Mathews. For this reason he was made a party, though he has no real interest.

On the afternoon of that day, Harper made an assignment of all his property to H. P. Lloyd, the plaintiff in error, under the insolvent laws of Ohio.

It appears that thereafter H. M. Healy, A. R. Bloomfield, Peter Schultz, and Albert Silva, creditors of Harper, brought suits in the Campbell Chancery Court on their several debts, and attached this building association stock. These cases were consolidated under the title of *Albert Silva* v. *Fidelity National Bank, etc., consolidated cases in equity*. In these cases, on the 16th of September, 1887, defendants filed their joint petition to be made parties defendant, and at the same term (September, 1887) they were made parties defendant. They set out in their pleading

the ownership by E. L. Harper of this building association stock, and of its transfer in a book, which was made an exhibit to the pleading; that Hattie A. Mathews was a creditor of Harper in an amount equal to the full face value of the stock; that the transfer of the stock was made some hours before the execution of the general deed of assignment of Harper; that Harper and Miss Mathews were both citizens and residents of the State of Ohio, and that by the laws of said state, insolvent debtors could make preferences in the payment of their creditors, either in the deed of assignment, or by paying them theretofore in such way as they saw proper; that Lloyd, as assignee, was claiming the said stock, and prayed that the stock be adjudged to the petitioner, Hattie A. Mathews.

On the 14th of January, 1888, Mathews and Otten filed their amended answer, in which the note before referred to is set out and filed as an exhibit. On the same day, Lloyd, assignee of Harper, filed reply to answer, and answer to cross-petition of Mathews and Otten. This is the pleading, if there be any in the case, that contains some allegations that involve a federal question, and gives this court jurisdiction. It contains five paragraphs.

The first paragraph denies that Harper owed Miss Mathews any thing at the time the stock was assigned. "He denies that, at the time of making said assignment, debtors had, by the laws of Ohio, the right to prefer their creditors in the deed of assignment." The second paragraph pleaded, *en totedem verbus*, section 4196 of the laws of Ohio. The third paragraph denies any consideration for the transfer. The fourth paragraph alleges the transfer to be fraudulent, and made with intent to hinder and delay the creditors of Harper. The fifth and last paragraph sets out section 6343 of the Ohio law in the exact

against him, and that the section of the Constitution of the United States relied on was brought to the notice of the state court, and the right which he now claims here claimed under it.

"Where all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decisions upon principles of law and equity, as recognized and administered in the state, and without reference to the construction or effect of any provision in the Constitution of the United States, or any act of congress, this court has no appellate power over the judgment of the state court pronounced in such a controversy."

This case, in many respects, is very like the case at bar, and the decision of Judge Taney, with a few minor changes, would be very applicable to this case.

Nowhere in the record in this case does it appear that any federal question was made by the plaintiff, directly or by implication.

The opinion of the Court of Appeals shows that the decision was founded upon principles of general law as administered by the courts of this country. The state court passed on the question of fact as to the validity of the debt of defendant in error against E. L. Harper.

The court recognized the rule that at common law an insolvent debtor could prefer a creditor, and that the common law is presumed to be the law of Ohio.

*Honore* v. *Hutchings*, 8 Bush, 687.

*Miles* v. *Collins*, 1 Met. 308.

The court held, further, that there was nothing in the statutes of Ohio, as quoted in the pleadings of plaintiff in error, that changed the common-law rule, and that the transfer by Harper to Miss Mathews of the building asso-

ciation stock in part payment of the debt was not a violation of the law of Ohio.

All these questions seem to have been decided by the state court on general principles of jurisprudence.

*Beaupre* v. *Noyes*, 138 U. S.

*Wiggins Ferry Co.* ad. *C. & A. R. R. Co.*, 119 U. S. 615.

In case of *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wallace, 116, the court lays down this rule to determine its jurisdiction in this class of cases:

"But the true and rational rule is, that the court must be able to see clearly from the whole record that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See also decision of Judge Catron in case of *Armstrong* v. *Treasurer of Athens Co.*, 16 Peters, 281, wherein he lays down six rules by which this court may determine its jurisdiction. This court in reviewing a judgment of a state court knows judicially only what the lower court knew. The law of Ohio in the Kentucky court must be plead and proved as any other fact.

No issue is raised in the pleadings as to the correctness of the quotation from the Ohio statutes by plaintiff in error. If the Supreme Court of Ohio had construed these statutes, the plaintiff in error should have plead and proved such construction. If then the Kentucky court had disregarded this construction, a federal question would then be presented.

Under the law this court can not look into the reports of the decisions of the Ohio courts to determine what, if any thing, they have decided as to these statutes, relied on

by plaintiff. In *Wiggins Ferry Co.* v. *C. & A. R. R., supra*, this court said:

"Whenever it becomes necessary under this requirement of the constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, exercising their original jurisdiction, take notice, without proof of the laws of the several states of the United States, but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here."

If it was necessary to prove the law of Ohio as a fact, it was necessary to plead it by proper allegations.

The statute having been plead simply, without pleading a construction of it by the Ohio Court, it remained for the state court to construe it.

It will no doubt be earnestly insisted by plaintiff in error that the validity of the Ohio statute was drawn in question, by the decision of the state court, by denying the ownership of the plaintiff in error, in the building association stock.

On this question the court in case of *County of Cook* v. *Calumet & C. C. & Dock Co., supra*, said:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In case of *Texas & P. R. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, the court said:

"To give jurisdiction to this court because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution or treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way.

"A title, right, privilege, or immunity is not properly claimed, under the act of congress, when it is suggested for the first time in a petition for a rehearing, after judgment."

Nothing was said in this case about a federal question or about the claim of plaintiff in error, asserted by reason thereof, until the petition for rehearing was filed. The case just cited seems to be conclusive on this point. There is a reason for the rule. The party seeking the relief should present the question by proper pleading and proof, and the attention of the court should be called to it, so that it can decide the case understandingly.

It is not intended that litigants should mislead the lower court into mistakes, which it would have avoided had the question been presented in proper time.

To the same effect, see *Caldwell* v. *Texas*, 137 U. S. 691.

So we think we are authorized to find:

*First.* It does not appear that any federal question was made by plaintiff or decided by the court below.

*Second.* It does not appear that the lower court *must* have decided a federal question in order to have reached the conclusion it did.

*Third.* The opinion of the state court shows that the

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JAMES H. McKEN

Robert Clarke & Co., Printers, Cincinnati.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 81.

H. P. LLOYD, ASSIGNEE OF E. L. HARPER,
PLAINTIFF IN ERROR,

vs.

HATTIE A. MATHEWS AND J. H. OTTEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

## BRIEF FOR DEFENDANTS IN ERROR.

JOHN S. DUCKER, COUNSEL.

Robert Clarke & Co., Printers, Cincinnati.] March, 1894.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

## No. 377.

H. P. LLOYD, ASSIGNEE OF E. L. HARPER,
PLAINTIFF IN ERROR,

vs.

HATTIE A. MATHEWS AND J. H. OTTEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

## BRIEF FOR DEFENDANTS IN ERROR.

JOHN S. DUCKER, COUNSEL.

### STATEMENT.

In 1881, the defendant in error, Hattie A. Mathews gave Mr. E. L. Harper some moneys to invest for her, which investments seem to have been fortunate, for a few months afterward, on the 8th of August in the same year, Mr. Harper gave Miss Mathews a demand note for $5000.00. The interest was paid on this note to January, 1, 1882. On the 27th of June, 1887, Harper being engaged in the banking business in the city of Cincinnati, found himself insolvent.

He was at that time the owner of some building association stock in Newport, Ky., worth about $5000.00. On the morning of that day he assigned this stock to the said defendant in error, in part payment of the said debt. The

there was an objection, and the objection was sustained. In this pleading plaintiff in error denied that Harper owed Mathews any thing at the time the stock was transferred, and set up the further fact that since his last pleading was filed he had discovered that Harper transferred to Mathews $5,000 of the stock of Swift's Iron and Steel Works worth so much money, and asked that she be required to account.

The plaintiff in error, in his pleadings, wherein he sets out and relies on the statutes of the State of Ohio, alleges that by reason of said statutes the attempted transfer by Harper of the building association stock was absolutely void. This pleading of the effect of the statutes of Ohio may or may not be an allegation of a fact. Be that as it may, the defendant in error, Hattie A. Mathews, filed a reply which will be found on page 14 of the printed record. The said pleading reads as follows:

"The defendant, Hattie A. Mathews, for reply to answer and cross-petition of H. P. Lloyd, says she admits that E. L. Harper was insolvent when he assigned the building association stock to her. She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but as was stated in her original pleadings, this was allowable under the laws of Ohio. *She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, that there is any thing which invalidates the transfer of the stock to this defendant, the same involved in the case.*

Wherefore the defendant prays as in her original pleadings and for general relief."

By the foregoing pleading she admits that the transfer of the building association stock was done for the purpose of preferring her to the other creditors of Harper, but denies that the Ohio law forbids it. On the 5th of September, 1888, plaintiff in error offered to file an amended answer to the cross-petition of Mathews, which was refused by the court. At the same term of the court a judgment was rendered giving the value of the stock, $4,914.89, to the plaintiff in error, and from this judgment defendant in error appealed to the Court of Appeals of Kentucky; and on the 27th of February, 1890, that court rendered a judgment reversing the Chancery Court and giving the value of the stock to the defendant in error, Hattie A. Mathews.

On a petition for rehearing, filed by plaintiff in error, the court on the 26th of April, 1890, delivered an extended opinion.

This opinion is found on page 54 of the printed record. Plaintiff in error claims that the law of Ohio that is set out in his pleading rendered void the transfer of the building association stock, and that the state court, in the judgment that it rendered, violated art. 4, sec. 1, of the Constitution of the United States, which provides that:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

This is the federal question supposed to be involved in this case.

## I.

*On April 25, 1892, a motion was made by defendants in error to dismiss for want of jurisdiction. The disposition of this motion was continued by the court until final hearing. This motion should prevail for the following reasons:*

*First.* Because there is no federal question involved in the controversy. In Kentucky, the laws of other states must be alleged as facts in the pleadings, and if denied they must be proved. In this case, the statutes of Ohio were plead as were also their effect. The statutes were not denied, but their effect was. As to how the laws of other states, in Kentucky, are proved, the court is referred to the following sections of the General Statutes of Kentucky:

Sec. 17: "The unwritten or common law of any other of the United States may be proved as facts by the parol evidence of persons learned in that law. The printed books of cases adjudged in the courts of a sister state may also be admitted as evidence of such law."

Sec. 19: "The printed laws of the United States, or of any state or territory thereof, which have been or shall be received in the secretary's office of this state, and which shall have been printed under the authority of the United States, or such state or territory, or a copy thereof, when duly certified by the secretary of state for this commonwealth, shall be admitted and received as evidence of such laws." (See general statutes of Kentucky (1888), p. 546, Bullitt & Feland.)

Plaintiff in error failed to plead the construction given the Ohio statutes by the courts of Ohio. He could have either plead the construction given these laws by the Ohio courts, or he could have introduced in evidence the printed books of cases adjudged in the State of Ohio, or he could

have proved the same by parol testimony of lawyers, by depositions incorporating therewith sworn copies of the law from printed volumes. In either case the evidence would have been a part of the record as any other evidence of facts.

The laws of Ohio, in the Kentucky courts, are recognized as facts provable as any other facts. In the trial of this case in the Kentucky court, the court tried the case on the evidence in the record. The court had no right to go outside of the record and examine the reports of the decisions of the Supreme Court of Ohio to determine the proper construction of an Ohio statute, and would have had no more power to do so than it would to have heard the statement of a witness on any question of fact, after the Record had been made up and the case was in the hands of the court for decision.

This court knows judicially what the Kentucky court does in the trial of this case. Were it an appeal from a subordinate court of the United States, the court would know judicially the laws of all the states of the Union, but it being an appeal from a state court, this court knows judicially only what the state court did.

In the case of *Hanley* v. *Donoghue*, 116 U. S. 7, this court said:

"When exercising an original jurisdiction under the Constitution of the laws of the United States, this court, as well as every other court of the national government, doubtless takes notice without proof of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here; and whatever was matter of fact in the court appealed from is matter of fact here.

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws or treaties of the United States, has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is, of course, within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state

are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up."

The case of *Chicago & Alton R. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, was a writ of error to the Supreme Court of Missouri, and involved a question of the proper construction of legislation of the State of Illinois. This court said *arguendo:*

"Whenever it becomes necessary under this requirement of the constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact here."

The plaintiff in error failed to offer any proof as to the construction of the statutes of Ohio, which he had pleaded, and it remained for the Kentucky court to construe these laws as local laws.

It will be observed that the question of the validity of the Ohio statutes is not involved, but simply a question of construction.

It is claimed by the defendants in error that the construction by the courts of one state of the statutes of another state does not present a federal question.

On this proposition this court has very frequently spoken, and but recently in the case of *Glenn* v. *Garth*, decided January 23, 1893.

This was a writ of error to the Supreme Court of the State of New York, and involved the question of the construction by the New York court of a statute of the State of Virginia. In an opinion delivered by the chief-justice, the following language was used:

"If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that

decision error intervened in the construction of the statutes of Virginia. If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." * * * * *

"This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York; nor can the contention of counsel, that the Virginia statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the constitution or laws of the United States."

On this question this court said, in case of *County of Cook* v. *Calumet & C. C. & Dock Co.*, 138 U. S. 639:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed."

In the case of *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wallace, 116, the court lays down this rule to determine its jurisdiction in this class of case:

"But the true and rational rule is, that the court must be able to see clearly from the whole record that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

In the case of the *Grand Gulf Railroad and Banking Company* v. *Marshall*, 12 How. 164, through Chief Justice Taney, this court said:

"But in order to give this court jurisdiction the record must show that the point was brought to the attion of the state court and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question, and the judgment founded upon its validity. This is evidently the meaning of the 25th section of the act of 1789, which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is en-

titled under the constitution or laws of the United States. But if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for any thing that appears in the record, the judgment of the state court might have been in his favor if its attention had been drawn to the question."

So it would seem, upon the authorities cited, that no federal question was involved in this legislation, or decided by the state court, nor does the record show that the state court must have decided a federal question to arrive at the conclusion it did. It will be seen that there is nothing in the record, from beginning to end, that shows that the plaintiff in error relied on any right which he claimed under any provision of the Constitution of the United States which was denied him by the state court.

*Second.* Conceding that there was a federal question, yet there is sufficient in the record to authorize the conclusion that the state court decided the case upon other questions of local law. There being nothing in the record showing how the laws of Ohio that were relied on by plaintiff in error had been construed by the courts of Ohio, it remained for the Kentucky court to place its own construction upon these statutes, and in connection therewith it appears that the courts in Kentucky, as elsewhere, presume that the common law is the law of the other states.

*Honore* v. *Hutchings*, 8 Bush, 687.
*Miles* v. *Collins*, 1 Met. 308.

At common law an insolvent debtor had the right to prefer any of his creditors to the exclusion of the others. The Kentucky court had the right to presume that this provision of the common law existed in the State of Ohio.

It appears from the opinion of the Court of Appeals (see p. 54 of the printed record) that the same rule prevails in Kentucky, with the exception that any creditor has the right within six months after preference to file a petition in the court of proper jurisdiction, and have the preference adjudged to be an act of insolvency, and thereby defeat the preference, but if the creditors fail to take such steps within the six months, the preference is good.

On these propositions the state court decided that the transfer by Harper to Miss Mathews of the building association stock was valid and binding under the law, and adjudged the value of the stock to her.

*Third.* There still remains another reason why the mo-

tion should prevail, and that is, because no mention was made by plaintiff in error, in any of the pleadings, so far as the record shows, of the claim of a federal question until the petition for rehearing was filed.

In case of *Texas & P. R. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, the syllabus reads thus:

"To give jurisdiction of this court because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution or treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way."

"A title, right, privilege, or immunity is not properly claimed, under the act of congress, when it is suggested for the first time in a *petition for a rehearing after judgment.*"

In the case of *A. R. Bushnell et al., plaintiffs in error*, v. *Crooke Mining and Smelting Co.*, decided by this court April 19, 1893, it was said that:

"The attempt to raise for the first time a federal question in a petition for a rehearing after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state."

In the case of *Loeber* v. *Schroeder, Adm'r*, decided May 10, 1893, this court said:

"It is also well settled by the decisions of this court that the attempt to raise for the first time a federal question in a petition for rehearing, after judgment, comes too late."

See to the same effect *Caldwell* v. *Texas*, 137 U. S. 691.

## II.

But if the court conclude that the motion to dismiss should not prevail and that a federal question is involved, and that we are in error on the propositions already discussed, then it is insisted by counsel that on the main proposition it will be found that the judgment appealed from was correct.

We have not discussed the question at all as to section 4196 of the statutes of Ohio, because it seems that the

plaintiff in error relies mainly upon the supposed mistake of the Kentucky court in construing section 6343, *supra*, of the statutes of Ohio.

By reference to the petition for rehearing (see p. 87 of the printed brief), it may be readily inferred that there has been some uncertainty among the lawyers and with some of the courts in Ohio as to the proper construction of this section.

Counsel for plaintiff in error, in his brief on the motion to dismiss (see p. 12 of the brief), has referred the court to the case of *Hakreader et al.* v. *Leiby et al.*, 4 Ohio St. 602, as an authority on the main question, that the Supreme Court of Ohio had construed the section referred to as claimed by him.

A casual reading of the *excerpt* from the decision quoted shows that the court made no such holding.

The plaintiffs in error in the said brief called the attention of this court to some Circuit Court decisions of the State of Ohio, construing this section.

Since the State of Ohio was admitted into the Union, it has been the constant and continual practice of insolvent debtors to make preferences in the payment of their creditors.

If there ever was any doubt about the right of insolvent debtors in Ohio to make preferences of their creditors by securing or paying them before a deed of assignment, all doubt is now removed.

There can be no further question on this proposition, as will be seen from an examination of the recent case of *Cross, Trustee*, v. *Carstens*, 48 Ohio St. 549, decided June 28, 1892.

The court has spoken in such a way that there is no difficulty in understanding its meaning. The opinion was delivered by Chief-Justice Spear.

As the case is believed by counsel, to conclude the plaintiff in error, the portion of the opinion applicable is incorporated in this brief.

The court used the following language:

"It is contended that when a debtor recognizes his insolvency and forms a purpose to assign his property to a trustee, all instruments that he may execute with that purpose in view, are in law one instrument. Hence, in the present case, the mortgages having been executed after the purpose to make the assignment had been formed, and at or about the same time the mortgages were, in fact and

law, part of the assignment, and therefore invalid as preferences.

"In support of this proposition the argument in brief is, that to hold the mortgages good as preferences, is to render the statute nugatory. The parties were aware, having resolved to make an assignment for the benefit of creditors, that the preferences desired to be made could not be incorporated in that instrument, and therefore agreed to carry out the purpose by the appearance of separate instruments, in the form of chattel mortgages, thus attempting to do indirectly what the statute forbade them doing directly. The thing done is substantially that which is prohibited, and the law, looking through form and color to substance, will strip off the disguises and give to the acts of the parties the true interpretation, and declare the several steps but one transaction, and as a result, order that done which equity and fair dealing requires, viz: An equal distribution of the proceeds of all the property among all creditors in proportion to the amount of their respective claims. This doctrine has been confidently argued by eminent lawyers, and has recently received the sanction of at least one Ohio court of high standing; perhaps of more than one."

"There is about it a spice of the heroic which challenges admiration, though it may not win acquiescence. Indeed, we may confess that, when first presented, we were attracted to the doctrine. But reflection has satisfied us that it is consistent neither with a fair interpretation of the statute nor with the previous decisions of this court, and, as an attempted rule of property, would prove unsubstantial and delusive, and practically impossible of execution."

Had this opinion been rendered before this writ of error was obtained, probably this case would not have been here.

The case is submitted with confidence, believing that the court will find no error in the proceedings in the state court, and will render a judgment accordingly.

Respectfully submitted.

Chas. J. Helm & JOHN S. DUCKER,

*Counsel for Defendants in Error.*

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